Supreme Court, U.S.
FILED
AUG 25 1975
MICHAEL RODAK, JR., CLERK

in the

Supreme Court

of the

United States

Case No. 75-284

METROPOLITAN DADE COUNTY, FLORIDA, et al.,
Appellants,

vs.

AEROJET-GENERAL CORPORATION,
Appellee.

On Appeal From The United States Court of Appeals for the Fifth Circuit, Case No. 74-1192

APPENDICES TO JURISDICTIONAL STATEMENT OF APPELLANTS

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APPENDIX A

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CASE NO. 74-1192

AEROJET-GENERAL CORPORATION,
Plaintiff-Appellee,

v.

REUBIN O'DONOVAN ASKEW, etc., et al.,
Defendants.

METROPOLITAN DADE COUNTY,
FLORIDA, et al.,
Defendants-Appellants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that METROPOLITAN DADE COUNTY, FLORIDA, and Stuart Simon, its County Attorney, Defendants-Appellants in the above styled cause, hereby appeal to the Supreme Court of the United States from the final judgment of the United States Court of Appeals for the Fifth Circuit originally dated April 21, 1975, and thereafter entered on May 30, 1975 (rehearing denied on May 30, 1975) affirming the judgment of the United States District Court for the Northern District of Florida dated November 21, 1973.

This appeal is taken pursuant to 28 U.S.C. §1254, paragraph (2).

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Attorneys for Defendants-
Appellants

by /s/ Alan T. Dimond
Alan T. Dimond

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true copies of the foregoing Notice of Appeal were mailed this 30 day of June, 1975, to the following attorneys for Plaintiff-Appellee:

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Alan T. Dimond

APPENDIX B

APPENDIX B

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

May 30, 1975

TO ALL COUNSEL OF RECORD

No. 74-1192

Aerojet-General Corp. vs. Reubin O'Donovan Askew, Etc. Et Al.; Metropolitan Dade County, Florida, Et Al., Etc.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

by Barbara Krei
Deputy Clerk

cc: Messrs. Stuart Simon
Alan T. Dimond
Messrs. Thomas C. Britton
Lawrence R. Metsch
Messrs. Barry S. Richard
William L. Rogers
Mr. Marion E. Sibley
Messrs. George W. Wright
Karl B. Block, Jr.
Fred N. Kellner
Mr. James Wm. Moore

APPENDIX C

APPENDIX C

[710]

AEROJET-GENERAL CORPORATION,
Plaintiff-Appellee,

v.

Reubin O'Donovan ASKEW, Governor
of State of Florida, et al.,
Defendants.

Metropolitan Dade County, Florida, et al., including its Board of County Commissioners and Stuart Simon, its County Attorney, Defendants-Appellants.

No. 74-1192.

United States Court of Appeals,
Fifth Circuit.

April 21, 1975.

An action was brought by a corporation, which had a lease with option to purchase state agency lands and which had obtained a federal court judgment, affirmed on appeal, for specific performance, declaratory and injunctive relief. The county, which claimed lands under a subsequently enacted statute giving counties the opportunity to acquire such lands and had obtained a deed from the agency pursuant to a mandamus judgment of the state Supreme Court sought, with others, to quiet title. The United States District Court for the Northern District of Florida at Tallahassee, David L. Middlebrooks, J., 366 F.Supp. 901, gave

judgment for the corporation and against the county. The county appealed. The Court of Appeals, Ainsworth, Circuit Judge, held that the question of res judicata was controlled by federal law, that the county was bound by the judgment in the specific performance action although it was not a party to the action, that the contract did not contemplate the application of the subsequently enacted statute, which thus could not be applied to the contract, without violating the contract clause of the Federal Constitution. It was also held that the decision of the Florida Supreme Court in the mandamus action of the county was not [711] controlling because of the nonadversary circumstances of the litigation.

Affirmed.

Roney, Circuit Judge, filed a specially concurring opinion.

1. Courts — 359.1(1)

Federal law governs question whether prior federal court judgment based on federal question jurisdiction is res judicata in case also brought under federal question jurisdiction. 28 U.S.C.A. §§ 1291, 1331, 1332; Fed.Rules Civ.Proc. rules 13(a), 41(a), 28 U.S.C.A.

2. Courts — 359.1(1)

Federal law governed question whether prior federal court judgment in suit brought only under diversity juris-

diction was res judicata in case brought under federal question jurisdiction. 28 U.S.C.A. §§ 1291, 1331, 1332; Fed. Rules Civ.Proc. rules 13(a), 41(a), 28 U.S.C.A.

3. Judgment — 713(2), 720

Where federal doctrine of res judicata applies, relitigation of any part of cause of action in question is barred, including all claims and defenses that were actually raised or could have been raised.

4. Federal Civil Procedure — 751

Where Florida statute was potential defense to specific performance action, constitutional issue whether statute violated contract clause of Federal Constitution could not have been pleaded in complaint, and responsibility for raising such issue lay with defendants. West's F.S.A. § 253.111; U.S.C.A.Const. art. 1, § 10.

5. Judgment — 592

Fact that only questions of state law have been actually pleaded and litigated in prior federal court case cannot justify frustration of federal law of res judicata.

6. Courts — 307.1(1)

Very purpose of federal diversity jurisdiction is to avoid bias against parties from outside the forum state. 28 U.S.C.A. § 1332.

7. Courts — 359.1(1)

State law appropriately governs whether federal court diversity judgment is res judicata in subsequent state court action, and also whether state court judgment is res judicata in subsequent federal court diversity action. 28 U.S.C.A. § 1332.

8. Judgment — 729

Under federal law of res judicata, party must raise all claims that are part of or defense to cause of action under adjudication.

9. Judgment — 828(3.41)

Where Florida statute was potential defense to specific performance action by corporation against state agency, so that corporation could not have properly pleaded it but rather it was responsibility of agency to raise issue as to applicability of the statute, county, whose interests were represented by the agency in the action, was barred by res judicata doctrine from claiming lands in question under such statute, in actions subsequently instituted, in federal court, by corporation for declaratory and injunctive relief, and by county to quiet title.

10. Judgment — 677

Under federal law of res judicata, person may be bound by judgment even though he was not party, if one

of parties to suit was so closely aligned with such person's interests as to be his virtual representative.

11. Judgment — 677

Question whether, for purposes of res judicata, parties' interests in case were virtually representative of interest of nonparty is question of fact for trial court.

12. Judgment — 955

Record sustained trial court's factual finding that interests of county which claimed right to conveyance of state agency's land under statute were virtually represented by state agency in private corporation's prior specific performance action against the agency, so that bar of res judicata doctrine would apply to [712] county though it was not party to the prior action.

13. Judgment — 951(1)

Florida state court judgment, like any judgment of competent jurisdiction, was entitled to presumption of regularity, but presumption could be overcome by evidence that judgment was product of nonadversary proceeding.

14. Judgment — 828(3.12)

Consent decrees are entitled to same respect accorded any judgment, so long as parties' interests being compromised and reconciled in the decree are truly adverse, and

federal courts are not free to disregard state court judgment simply because both parties consented to its entry.

15. Courts — 490

Respect for integrity of courts of states requires that federal courts exercise great caution in questioning non-adversary nature of state court proceeding.

16. Judgment — 828(3.10)

Where it was conceded that relationship between parties to action in state court was not adversary one, federal district court was not obliged to follow state court decision.

17. Courts — 361(2)

Where violation of contractc lause was alleged, existence of contract and nature and extent of its obligation became federal questions. U.S.C.A.Const. art. 1, § 10.

18. Vendor and Purchaser — 57

Under rule that contract will not be construed to yield absurd results, where party gave valuable consideration for option to purchase with provision that conveyance was to be "subject to applicable statutory rights and reservations in effect on date of conveyance," such provision did not contemplate nullification at will by state legislature but rather referred to Florida statute providing for

reservation of certain interests in phosphate, minerals, metals, gas and oil. West's F.S.A. §§ 253.111, 253.111(1), 270.11.

19. Public Lands — 66

Under Florida statute, statutory obligation of board of trustees of internal improvement trust fund to offer appropriate county any land trustees shall sell arises prospectively only. West's F.S.A. §§ 253.111, 253.111(1).

20. Statutes — 181(2)

Belief in correctness of statutory interpretation was reinforced by certainty that, if statute were otherwise construed as contended, it would violate contract clause. West's F.S.A. § 253.111; U.S.C.A.Const. art. 1, § 10.

Stuart Simon, Dade County Atty., Alan T. Dimond, Asst. County Atty., Thomas C. Britton, Lawrence R. Metsch, Miami, Fla., Barry S. Richard, Deputy Atty. Gen., Dept. of Legal Affairs, William L. Rogers, Asst. Atty. Gen., Tallahassee, Fla., Marion E. Sibley, Sp. Asst. Atty. Gen., Miami Beach, Fla., for defendants-appellants.

George W. Wright, Jr., Karl B. Block, Jr., Fred N. Kellner, Miami, Fla., James Wm. Moore, New Haven, Conn., for plaintiff-appellee.

Appeal from the United States District Court for the Northern District of Florida.

Before BELL, AINSWORTH and RONEY, Circuit Judges.

AINSWORTH, Circuit Judge:

Important questions concerning the doctrine of res judicata and the Contract Clause of the United States Constitution are presented in this much-litigated dispute over title to a large tract of land in Dade County, Florida. The judgment appealed from is the result of two lawsuits. Aerojet-General Corporation brought an action in the United States District Court for the Northern District of Florida against Metropolitan Dade County, Florida, the Board of Trustees of the Internal Improvement Trust Fund (a Florida state agency), and the Board of Education of the State of Florida, seeking declaratory and injunctive relief to prevent defendants from instituting [713] or prosecuting suits in Florida state courts to deny Aerojet's title to the land involved. Jurisdiction was asserted on the basis of diversity of citizenship and the existence of a federal question. See 28 U.S.C. §§ 1331, 1332. The second suit was filed by Metropolitan Dade County against Aerojet-General Corporation in a Florida state district court to quiet title to the subject land. It was removed to the United States District Court for the Southern District of Florida by Aerojet on allegations of diversity of citizenship and existence of a federal question. See 28 U.S.C. § 1441. Subsequently the case was transferred to the Northern District. The suits were then consolidated and reciprocal motions for summary judgment were filed by the parties, there being no dispute as to the material facts. The District Court rendered judgment in favor of Aerojet, confirming its title to the land involved. 366 F.Supp. 901 (1973). Only Dade County has appealed. We affirm.

I. Background of the Present Appeal

On December 21, 1961, plaintiff Aerojet-General Corporation entered into a written agreement with the Board of Trustees of the Internal Improvement Trust Fund and the Board of Education of the State of Florida[1] by which Aerojet was granted a ten-year leasehold in 25,313 acres of land in Dade County, Florida, and an option to purchase the land for $50 per acre at any time during the term of the lease, subject to certain qualifications.[2]

In 1965 the Florida State Legislature enacted a statute requiring that the Trustees, upon deciding to sell state-owned land to private parties, first afford an opportunity

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[1]The same state officials are members of both boards: the Governor, Secretary of State, Attorney General, Comptroller, Treasurer, Commissioner of Agriculture, and Commissioner of Education. F.S.A. §§ 229.012, 253.02(1) (1975). These officials are referred to as "the state boards" in this opinion. Their authority is described in F.S.A. § 253.02(6) (1975).

[2]See Section III-B, infra.

to the county in which the land is located to receive such lands. F.S.A. § 253.111 (1975).[3] On September 8, 1969, Aerojet notified the Trustees of its intention to exercise its option to purchase the leased property, but the Trustees refused to convey the land to Aerojet as provided in the agreement.

Aerojet then brought a diversity suit against the Trustees and the Board of Education in the United States District Court for the Northern District of Florida seeking specific performance of the option agreement to purchase the land. The principal defense was failure of consideration in that Aerojet's manufacturing plant built on the land

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[3] 253.111 Notice to board of county commissioners before sale

The board of trustees of the internal improvement trust fund of the state shall not sell or convey any land to which they hold title unless and until they shall afford an opportunity to the county in which such land is situated to receive such land for public purposes on the following terms and conditions:

(1) If an application is filed with the board requesting that they sell certain land to which they hold title and the board shall decide to sell such land or if the board shall, without such application, decide to sell such land the board shall, before consideration of any private offers, notify the board of county commissioners of the county in which such land is situated that such land is available to such county. Such notification shall be given by registered mail, return receipt requested.

(2) The board of county commissioners of the county in which such land is situated shall, within ninety days after receipt of such notification from the board, determine by resolution whether or not it proposes to devote such land to public parks, public beaches, public fishing piers, public boat ramps, public dockage facilities or other public outdoor recreational purposes, hereinafter referred to generally as public outdoor recreational purposes.

involved was not in full operation but was in inactive status due to the current slowdown in solid fuel rocket development. The defendant state boards did not, however, raise as a defense their obligation to the counties under the 1965 Florida statute [714] (F.S.A. § 253.111) in disposing of state lands. On September 21, 1970, the District Court granted Aerojet's motion for summary judgment, Aerojet-General Corporation v. Kirk, N.D.Fla., 1970, 318 F.Supp. 55, and ordered the defendants to convey the land to Aerojet. The defendant state boards appealed, and we affirmed the judgment of the District Court on December 9, 1971. 5 Cir., 453 F.2d 819, cert. denied, 409 U.S. 892, 93 S.Ct. 110, 34 L.Ed.2d 149 (1972).

On June 20, 1972, because of the state boards' failure to transfer title in the land to Aerojet, the District Court appointed the Clerk of the United States District Court for the Southern District of Florida as a Commissioner for the purpose of executing a deed to the land in favor of Aerojet. The deed was executed immediately, and Aerojet transmitted a cashier's check for $1,246,308.88 in payment thereof to the Trustees.

Earlier, on June 9, 1972, defendant-appellant Metropolitan Dade County, Florida brought a mandamus action in the Supreme Court of Florida against the state boards to compel them to convey the land to it, based on the 1965 enactment of the Florida Legislature requiring that public lands be offered first to the local county before being sold to private parties. F.S.A. § 253.111 (1975). The County alleged that any right which Aerojet had to ac-

quire the land was superseded by the County's right under the Florid statute. The state boards offered no opposition to this suit and even more, by written pleading waived notice of hearing and affirmatively consented to the entry of the alternative writ of mandamus. Accordingly, the Supreme Court of Florida issued the requested writ of mandamus on October 11, 1972, and the Trustees, in compliance therewith, executed a deed to the land to Dade County on October 31, 1972.

On June 20, 1972, the same day that the District Court appointed the Clerk as a Commissioner to execute the deed to the land to Aerojet, the present action was initiated in the District Court by Aerojet against the state boards and Dade County. Aerojet sought an injunction against further prosecution of the mandamus action by Dade County against the state boards in the Florida Supreme Court and against any other actions regarding the disputed lands, on the ground that any assertion of rights under F.S.A. § 253.111 was barred by the prior federal court judgment under the principle of res judicata. Alternatively, Aerojet sought a judgment declaring that F.S.A. § 253.111 was inapplicable to its lease-option contract — or if applicable, was violative of the Contract Clause of the United States Constitution.

The defendants' response to Aerojet's plea of res judicata was that, since federal jurisdiction had been invoked on the basis of diversity of citizenship, the District Court was obliged to follow state law. Defendants contended that the Florida Supreme Court's decision in their

mandamus action was the definitive statement of Florida law on whether the prior federal court judgment was res judicata. They argued that the state court could not have reached the question whether F.S.A. § 253.111 required that the County be offered the land without implicitly holding that the prior federal court suit was not a bar, at least as to the County.

On October 31, 1972, the day the Trustees executed the deed to the land in favor of Dade County, Aerojet and the County appeared before the District Court at an emergency hearing. The Court enjoined Dade County from recording its newly acquired deed and from instituting any action to quiet title to the property, and enjoined Aerojet from conveying any part of the disputed land.

On January 8, 1973, the District Court stayed further proceedings in Aerojet's suit for injunctive and declaratory relief and abstained from further action in anticipation of clarification by the state courts of Florida of the statutory issues involved in the case. Aerojet immediately appealed to this Court from the entry of this order. On January 10, 1973, Dade County, no longer under a prohibitory injunction from the federal district court, initiated its quiet title suit in Florida state court against Aerojet, which, as we have already stated, was later removed by Aerojet to the United States District Court for the Southern District of Florida.

On March 5, 1973, this Court rendered its decision on Aerojet's appeal from the District Court's order, and held

that in view of Aerojet's removal of the County's quiet title suit there was no longer any reason for abstention. 476 F.2d 184. The District Court was ordered to reinstate its injunction against suits challenging Aerojet's title and to proceed with the merits of Aerojet's claims. (The Court also suggested that the quiet title suit be transferred to the Northern District to be consolidated with Aerojet's suit — which, as we have said, was done.)

On November 21, 1973, the District Court rendered its decision in favor of Aerojet. Aerojet-General Corporation v. Askew, N.D.Fla., 1973, 366 F.Supp. 901. The Court held that F.S.A. § 253.111 unconstitutionally impaired the obligation of contract as applied to Aerojet's contract, and that under the doctrine of res judicata the original federal court judgment of September 21, 1970 barred all the defendants from asserting the provisions of F.S.A. § 253.111 as a defense to Aerojet's action to effectuate the prior judgment.

II. Res Judicata and the Prior Federal Court Judgment

A. Choice of Law: Federal or State

The District Court apparently conceded that the Florida law of res judicata governs the question whether the prior federal court judgment (rendered on September 21, 1970) barred Dade County from raising the provisions of F.S.A. § 253.111 as a defense in the action by Aerojet to effectuate that judgment. We hold, however, that federal rather than state standards are applicable.

(1-5) Federal law clearly governs the question whether a prior federal court judgment based on federal question jurisdiction is res judicata in a case also brought, as this one was, under federal question jurisdiction. We believe the same result obtains where, as in this case, the first suit was brought only under diversity jurisdiction. The federal doctrine of res judicata bars relitigating any part of the cause of action in question, including all claims and defenses that were actually raised or could have been raised.[4] The forum state's law may be narrower than federal law on the scope of the cause of action deemed to be adjudicated for purposes of res judicata. In cases where both state law issues and federal questions are presented, if the narrower state law were applicable a party could split his cause of action and thus circumvent the federal law of res judicata, simply by not pleading his federal claim or defense. See Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 60 S.Ct. 317, 84 L.Ed. 329 (1940). In any subsequent federal court litigation, the prior case would appear to have been based only on diversity jurisdiction if the pleadings alone were considered. Looking beyond the pleadings to what could have been pleaded, however, is precisely what is required by the federal law of res judicata, and precisely what was called for in this case. The state boards could have pleaded a defense that would have brought a federal question directly into the case: their alleged obligation to Dade County under

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[4]See Section II-B-1, infra.

F.S.A. § 253.111.[5] The fact that only questions of state law were actually pleaded and litigated in the prior federal court case cannot justify such frustration of the federal law of res judicata.

[716] In Angel v. Bullington, 330 U.S. 183, 67 S.Ct. 657, 91 L.Ed. 832 (1947), the Court held that state law governs whether a state court judgment is res judicata in a subsequent federal diversity case. The Court noted, however, that "where resort is had to a federal court not on grounds of diversity of citizenship but because of a federal right is claimed, the limitations upon the courts of a State do not control a federal court sitting in the State." 330 U.S. at 192, 67 S.Ct. at 662. See Metropolitan Paving Co. v. International U. of Op. Eng., 10 Cir., 1971, 439 F.2d 300, 307; Pearlstein v. Scudder & German, 2 Cir., 1970, 429 F.2d 1136, 1144 n. 14; Williams v. Ocean Transport Lines, Inc., 3 Cir., 1970, 425 F.2d 1183, 1187-1190. The same reasoning must apply where the prior case is not brought in a state court but rather in a federal court under diversity jurisdiction.

(6) Considering this case solely in its diversity aspect also leads us to the conclusion that the federal law of

[5]Responsibility for raising the constitutional issue—whether F.S.A. § 253.111 violates the Contract Clause—clearly lay with the defendant Trustees in the first federal case, rather than with Aerojet. Indeed Aerojet could not have raised the issue. The Florida statute was a potential defense of the Trustees to the specific performance action and could not have been pleaded in Aerojet's complaint. See Louisville & N. R. Co. v. Mottley, 211 U.S. 149, 29 S.Ct. 42, 53 L.Ed. 126 (1908).

res judicata should be applied. The importance of preserving the integrity of federal court judgments cannot be overemphasized — out of respect for the federal courts and for the policy of bringing litigation conclusively to an end. If state courts could eradicate the force and effect of federal court judgments through supervening interpretations of the state law of res judicata, federal courts would not be a reliable forum for final adjudication of a diversity litigant's claims.[6] Nullification of a federal court judgment

would be precisely the result in this case if, as Dade County urges, the District Court had been obliged to follow state law to decide the question of res judicata. Absent other reasons for declining to follow the mandamus judgment of the Florida Supreme Court,[7] that decision would have compelled the District Court to hold that the prior federal court judgment was not res judicata as to Dade County's assertion of F.S.A. § 253.111 as a defense.

[6]The very purpose of federal diversity jurisdiction is to avoid bias against parties from outside the forum state. Guaranty Trust Co. of New York v. York, 326 U.S. 99, at 111, 65 S.Ct. 1464, at 1471, 89 L.Ed. 2079; Erie R. Co. v. Tompkins, 304 U.S. 64, at 74, 58 S.Ct. 817, at 820, 82 L.Ed. 1188 (1938); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 347, 4 L.Ed. 97, 108 (1816); The Bank of the United States v. Deveaux, 9 U.S. (5 Cir.) 61, 87, 3 L.Ed. 38, 45 (1809). To permit Dade County to nullify a prior federal court judgment rendered in favor of Aerojet, an out-of-state party, through subsequent state court action would fly in the face of that purpose.

[7]The District Court apparently believed that, under Erie, state law governed the question whether the prior federal court judgment was res judicata. It concluded nevertheless that the mandamus granted by the Florida Supreme Court need not be followed because it was based on a nonadversary proceeding. See Section III-A, infra.

Our research reveals only one case in which this choice of law issue has been discussed at any length. In Kern v. Hettinger, 2 Cir., 1962, 303 F.2d 333, the Second Circuit held that the question whether a federal court diversity judgment is res judicata must be determined according to federal law in a subsequent federal diversity case. We agree with the reasoning in that case:

> One of the strongest policies a court can have is that of determining the scope of its own judgments. (Citations omitted) It would be destructive of the basic principles of the Federal Rules of Civil Procedure to say that the effect of a judgment of a federal court was governed by the law of the state where the court sits simply because the source of federal jurisdiction is diversity. The rights and obligations of the parties are fixed by state law. These may be created, modified and enforced by the state acting through its own judicial establishment. But we think it would be strange doctrine to allow a state to nullify the judgments of federal courts constitutionally established and given power also to enforce state created rights. The Erie doctrine [citations omitted] is not applicable here . . .
> 303 F.2d at 340.[8]

[8]See In re Air Crash Disaster, Dayton, Ohio, On March 9, 1967, S.D.Ohio, 1972, 350 F.Supp. 757, 762-764; Hassenplug v. Victor Lynn Lines, E.D.Pa., 1947, 71 F.Supp. 70, aff'd 3 Cir., 1947, 163 F.2d 828; Moore's Federa' Practice ¶ 0.316[6]. Contra Blum v. William Goldman Theaters, 3 Cir., 1949, 174 F.2d 914; Hartmann v. Time, 3 Cir., 1948, 166 F.2d 127. Despite occasional dicta suggesting that state law may govern res judicata in diversity cases, the only cases that have so held are Blum and Hartman, supra. See Murphy v. Landsburg, 3 Cir., 1973, 490 F.2d 319, 322 n. 4; Provident Tradesmens B & T Co.

[717] A second reason for applying federal law under these circumstances is that several procedural elements of federal practice affect the doctrine of res judicata. For example, federal law on finality of judgments, see 28 U.S.C. § 1291 (1971), and compulsory counterclaims, Fed.R.

v. Lumbermens Mut. Cas. Co., 3 Cir., 1969, 411 F.2d 88, 94; Kimmel v. Yankee Lines, 3 Cir., 1955, 224 F.2d 644. Those cases contain virtually no discussion of the choice of law problem, and we decline to follow them. Cf. 19 A.L.R. Fed 709.

The Fourth Circuit has taken the same approach to federal-state choice of law problems as expressed by the Second Circuit in Kern. Atkins v. Schmutz Manufacturing Company, 4 Cir., 1970, 435 F.2d 527, presented the question whether state or federal law controlled whether the filing of one diversity action tolled the applicable statute of limitations as to another diversity action filed in a different District Court. In holding that federal law applies, Judge Haynsworth wrote:

> It is, of course, neither possible nor necessary for federal courts to be totally neutral in the adjudication of state-created rights. It is not possible simply because federal courts are not protean and are unable to transform themselves into exact replicas of their state counterparts. That state and federal judicial systems are not identic will inevitably mean that the choice of forum will have some effect upon the course of litigation. Some adoption of state court procedures by federal courts sitting in diversity may be feasible, but it may also be in conflict with fundamental interests of the federal courts in the conduct of their own business and the maintenance of the integrity of their own procedures, the legitimate interests of a federal forum, qua forum.
> 435 F.2d at 536.

Breeland v. Security Insurance Co. of New Haven, Conn., 5 Cir., 1969, 421 F.2d 918, cited by the County, and Berner v. British Commonwealth Pacific Airlines, Ltd., 2 Cir., 1965 346 F.2d 532, are inapposite. Those cases concerned collateral estoppel—in Breeland the collateral effect of a criminal conviction—rather than res judicata. See James Talcott, Inc. v. Allahabad Bank, Ltd., 5 Cir., 1971, 444 F.2d 451, 461 & n. 9; Seguros Tepeyac, S. A., Compania Mexicana v. Jernigan, 5 Cir., 1969, 410 F.2d 718, 725-728; St. Paul Fire and Marine Insurance Company v. Lack, 4 Cir., 1973, 476 F.2d 583, 585-586; Ritchie v. Landau, 2 Cir., 1973, 475 F.2d 151, 154; Greenberg v. Mobil Oil Corporation, N.D.Tex., 1970, 318 F.Supp. 1025, 1032. Moreover in

Civ.P. 13(a), is often determinative of pleas of res judicata. See Fed.R.Civ.P. 41(a); La Societe Anonyme des Parfums LeGalion v. Jean Patou, Inc., 2 Cir., 1974, 495 F.2d 1265, 1275. We see no persuasive reason to look to state law for some elements of res judicata, such as the scope of the cause of action or similarity of the parties, in light of the prominent influence of federal law on other elements of the doctrine. To do so would sacrifice the uniformity of the law which federal courts must apply. See generally, United States v. United Air Lines, Inc., E.D. Wash., 1962, 216 F.Supp. 709, 718-72[illegible], aff'd sub nom. United Air Lines, Inc. v. Wiener, 9 Cir., 1964, 335 F.2d 379, 404; Hughes v. Dundee Mortgage & Trust Investment Co., D.Or., 1886, 28 F. 47; 1B Moore's Federal Practice ¶ 0.414(1).

(7) We are aware of the importance of honoring the obligation to follow substantive law in diversity cases,[9] but

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Berner the court found plausible rationales for applying state or federal law, but did not reach the issue in rendering its decision. The application of state law on collateral estoppel cannot nullify a federal court judgment. That doctrine affects only the ancillary consequences of such judgments.

[9]As we noted earlier, see footnote 6 supra, avoiding state court bias is a major purpose of diversity judisdiction and an important reason for applying federal law to determine whether a prior federal court diversity judgment is res judicata in a subsequent diversity case. It should be noted that our holding accomplishes that purpose without intruding into the legitimate domain of state law under the Erie doctrine. Where a federal court judgment based on diversity jurisdiction is pleaded as res judicata in state court, the danger of state court bias causing untoward effects in the integrity of federal court judgments is minimal. If bias were a problem one party or the other would have

as [718] the Supreme Court has stated in a similar context, "there are affirmative countervailing considerations at work here. The federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction." Byrd v. Blue Ridge Rural Electric Cooperative, Inc., 356 U.S. 525, 537, 78 S.Ct. 893, 901, 23 L.Ed.2d 953 (1958). In this lawsuit, whether considered as a federal question case or a diversity case, we believe such considerations are present.

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filed the suit in federal court or removed it there. Accordingly, state law has been held to govern whether a federal court diversity judgment is res judicata in a subsequent state court action. See Dupasseur v. Rochereau, 88 U.S. (21 Wall.) 130, 22 L.Ed. 588 (1875); Crescent City, Etc., Co. v. Butchers' Union, Etc., Co., 120 U.S. 141, 7 S.Ct. 472, 30 L.Ed. 614 (1887). Where a state court judgment is pleaded as res judicata in a subsequent federal court diversity action, applying state law is also appropriate. There is little chance of bias against any of the parties or their privies, since the first case has gone to judgment in a state court, rather than being brought in, or removed to, federal court. The federal courts have uniformly applied state law under these circumstances. See Angel v. Bullington, 330 U.S. 183, 67 S.Ct. 657, 91 L.Ed. 832 (1947); Oklahoma Packing Co. v. Oklahoma Gas & Electric Co., 309 U.S. 4, 8, 60 S.Ct. 215, 217, 84 L.Ed. 447 (1940); Wright v. Georgia R. & B. Co., 216 U.S. 420, 429, 30 S.Ct. 242, 245, 54 L.Ed. 544 (1910); Lynn Carol Fashions, Inc. v. Cranston Print Works Co., 3 Cir., 1972, 453 F.2d 1177, 1182-1184; Anderson v. Moorer, 5 Cir., 1967, 372 F.2d 747, 751-752; Graves v. Associated Transport, Inc., 4 Cir., 1965, 344 F.2d 894, 896; Gedeon v. State Farm Mutual Automobile Insurance Co., 3 Cir., 1965, 342 F.2d 15, 17; Gramm v. Lincoln, 9 Cir., 1958, 257 F.2d 250, 255 n. 6; Standard Acc. Ins. Co. v. Doiron, 1 Cir., 1948, 170 F.2d 206, 208. Cf. Thomas v. Consolidation Coal Company, 4 Cir., 1967, 380 F.2d 69, 79 (federal law applies to determine whether a prior state court judgment is res judicata in a federal court suit under 29 U.S.C. § 185(a) [LMRDA]).

B. Application of the Federal Law of Res Judicata to this Case

(8, 9) 1. Scope of the cause of action. Under the federal law of res judicata a party must raise all claims that are a part of or a defense to the cause of action under adjudication. Commissioner of Internal Revenue v. Sunnen, 333 U.S. 591, 597, 68 S.Ct. 715, 719, 92 L.Ed. 898 (1948); Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 378, 60 S.Ct. 317, 320, 84 L.Ed. 329 (1940); Baltimore S. S. Co. v. Phillips, 274 U.S. 316, 321, 47 S.Ct. 600, 602, 71 L.Ed. 1069 (1927); Southwest T & T Suppliers, Inc. v. American Enca Corp., 5 Cir., 1972, 463 F.2d 1165, 1167; see Wasoff v. American Automobile Insurance Co., 5 Cir., 1971, 451 F.2d 767, 769 & n. 8; Astron Industrial Associates Inc. v. Chrysler Motors Corp., 5 Cir., 1968, 405 F.2d 958, 961-962; Acree v. Air Line Pilots Association, 5 Cir., 1968, 390 F.2d 199, 203; Norman Tobacco & Candy Co. v. Gillette Safety Razor Co., 5 Cir., 1961, 295 F.2d 362, 363-364; 1B More's Federal Practice ¶ 0.401, at 12-13. Our most recent discussion of the tests for determining whether the substance of two actions is the same for res judicata purposes appears in the Astron case, supra:

> Is the same right infringed by the same wrong? Would a different judgment obtained in the second action impair rights under the first judgment? Would the same evidence sustain both judgments?

405 F.2d at 961-962. Under any of these questions, the defense Dade County offers in this suit, the alleged supersed-

seding effect of F.S.A. § 253.111, is part of the same subject matter adjudicated in Aerojet's original suit for specific performance.

The constitutionality of F.S.A. § 253.111 as applied to Aerojet's contract was not raised by the defendant Florida state boards in the original suit by Aerojet for specific performance, but clearly it could have been. In October 1969 the Attorney General of Florida advised the state boards of his opinion that F.S.A. § 253.111 applied to the lease-option contract in question. Thus the state boards were fully aware that the Florida statute might possibly offer them a defense. They chose not to raise that defense and must now accept the consequences of their decision.

[719] 2. The doctrine of virtual representation. Dade County concedes that the prior federal court judgment bars the state boards from now raising the defense that F.S.A. § 253.111 obligates them to offer the land to the County. It contends, however, that since it was not a party to Aerojet's original suit, the interests of the state boards were too distinct to permit the conclusion, reached by the District Court, that they were the virtual representative of the County.

(10) Under the federal law of res judicata, a person may be bound by a judgment even though not a party if one of the parties to the suit is so closely aligned with his interests as to be his virtual representative. See Chicago, R. I. & P. Ry. Co. v. Schendel, 270 U.S. 611, 618, 46 S.Ct. 420, 423, 70 L.Ed. 757 (1926); Heckman v. United States,

224 U.S. 413, 445-446, 32 S.Ct. 424, 434-435, 56 L.Ed. 820 (1912); Kerrison v. Stewart, 93 U.S. 155, 160, 23 L.Ed. 843, 845 (1876); Dudley v. Smith, 5 Cir., 1974, 504 F.2d 979, 982; Astron Industrial Associates, Inc. v. Chrysler Motors Corp., 5 Cir., 1968, 405 F.2d 958, 961; Kreager v. General Electric Company, 2 Cir., 1974, 497 F.2d 468, 472; Pan American Match, Inc. v. Sears, Roebuck and Co., 1 Cir., 1972, 454 F.2d 871, 874; Robison v. Sidebotham, 9 Cir., 1957, 243 F.2d 16, 21; Jamison v. Garrett, 1953, 92 U.S.App.D.C. 232, 205 F.2d 15, 16; United States v. City of Philadelphia, 3 Cir., 1944, 140 F.2d 406, 408; United States v. Des Moines Valley R. Co., 8 Cir., 1897, 84 F.40. Cf. Spokane & I. E. R. Co. v. Whitley, 237 U.S. 487, 35 S.Ct. 655, 59 L.Ed. 1060 (1915); Troxell v. Delaware L. & W. R. Co., 227 U.S. 434, 33 S.Ct. 274, 57 L.Ed. 586 (1913). Dade County asserts that it was in the state boards' best interest to keep the land, rather than convey it to either Aerojet or the County, and therefore it would have been against their interests to raise F.S.A. § 253.111 as a defense to Aerojet's specific performance suit. Assuming this assertion to be true, we nevertheless believe the interests of the state boards and the County were closely aligned.

The state boards could have retained the disputed land only by persuading the District Court that they were not under any contractual obligation to convey the land to Aerojet. Failing that, their only options were to convey the land to Aerojet or to convince the District Court that they had an overriding obligation to offer the land to Dade County, pursuant to F.S.A. § 253.111.

Clearly the state boards preferred to transfer the land to the County rather than to Aerojet. Their submissive role in the Florida state court mandamus proceeding amply demonstrates that preference. The statute required the state boards to offer the land to the appropriate county only if they decided to sell the land at all — only if the lease-option contract with Aerojet was valid. It would not have prejudiced their alleged interest to raise F.S.A. § 253.111 as an alternative to their defense that the lease-option contract was not valid.[10]

(11, 12) The question whether a party's interests in a case are virtually representative of the interests of a non-party is one of fact for the trial court. See Astron Industrial Associates, Inc. v. Chrysler Motors Corp., 5 Cir., 1968, 405 F.2d 958, 961. We find no reason to overturn the District Court's determination [720] that Dade County "was in such close relationship to the parties to the first

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[10]Except for the decision of the Florida Supreme Court in the mandamus suit brought by Dade County against the Trustees, the Florida law of res judicata on the scope of the cause of action and the doctrine of virtual representation is the same as the federal law. See Hinchee v. Fisher, Fla., 1957, 93 So.2d 351, 353; Gordon v. Gordon, Fla., 1952, 59 So.2d 40, 43-44; Wolfson v. Rubin, Fla., 1951, 52 So.2d 344, 346; Young v. Miami Beach Improvement Co., Fla., 1950, 46 So.2d 26, 30; Lockhart v. Dade County, Fla., 1946, 25 So.2d 646, 647 (scope of cause of action); City of New Port Richey v. State, Fla., 1962, 145 So.2d 903, 905-906; Young v. Miami Beach Improvement Co., supra, 46 So.2d at 30; Sauls v. Freeman, Fla., 1888, 24 Fla. 209, 4 So. 525 (identity of parties). Though the District Court should have applied federal law, there is no need to remand. The state court mandamus decision and our reasons for not following it are discussed fully in section III, infra.

lawsuit before this Court, that its interests or the interests of those which it represents, were represented in that proceeding." 366 F.Supp. at 910.

III. Interpreting the Lease-Option Contract and the Florida Statute

The District Court concluded that the lease-option contract between Aerojet and the state boards did not contemplate the application of F.S.A. § 253.111 and that the statute could not be constitutionally applied to the contract. The District Court also held that the decision of the Florida Supreme Court in the mandamus action by Dade County was not controlling because of the nonadversary circumstances of that litigation. We believe the District Court's decision was correct.

A. The Judgment of the Florida State Court

(13) The writ of mandamus issued by the Supreme Court of Florida in favor of Dade County against the state boards rested explicitly upon the conclusion that the contract between Aerojet and the state boards was intended to permit modification by subsequent statute, such as F.S.A. § 253.111. The Florida state court judgment, like any judgment of a court of competent jurisdiction, is entitled to a presumption of regularity. See Webster v. Estelle, 5 Cir., 1974, 505 F.2d 926, 928. The presumption, however, can be overcome by evidence that the judgment is the product of a nonadversary proceeding. In Lord v. Veazie, 8 How. 251, 49 U.S. 251, 255-256, 12 L.Ed. 1067,

1069 (1850), the Supreme Court refused to hear an appeal from a circuit court because

> the plaintiff and defendant have the same interest, and that interest (is) adverse and in conflict with the interest of third persons, whose rights would be seriously affected if the question of law was decided in the manner that both parties to this suit desire it to be.

A judgment entered under such circumstances, and for such purposes, is a mere form. The whole proceeding was in contempt of the court, and highly reprehensible, and the learned district judge, who was then holding the Circuit Court, undoubtedly suffered the judgment pro forma to be entered under the impression that there was in fact a controversy between the plaintiff and defendant, and that they were proceeding to obtain a decision upon a disputed question of law, in which they had adverse interests. A judgment in form, thus procured, in the eye of the law is no judgment of the court.

See United States v. Johnson, 319 U.S. 302, 63 S.Ct. 1075, 87 L.Ed. 1413 (1943); Chicago & G. T. Ry. Co. v. Wellman, 143 U.S. 339, 12 S.Ct. 400, 36 L.Ed. 176 (1892); Chamberlain v. Cleveland, 66 U.S. 419, 1 L.Ed. 93 (1862); Waialua Agr. Co. v. Maneja, 9 Cir., 1949, 178 F.2d 603.

(14) Federal courts have declined to follow nonadversary decisions of state courts as well as federal courts. In federal taxation cases the federal courts have not considered themselves bound by collusive state court judg-

ments — "collusive in the sense that all the parties joined in a submission of the issues and sought a decision which would adversely affect the Government's right to additional income tax." Freuler v. Helvering, 291 U.S. 35, 45, 54 S.Ct. 308, 312, 78 L.Ed. 634 (1934). See Stallworth's Estate v. Commissioner of Internal Rev., 5 Cir., 1958, 260 F.2d 760, 763; Saulsbury v. United States, 5 Cir., 1952, 199 F.2d 578, 580; In re Estate of Abely, 1 Cir., 1974, 489 F.2d 1327, 1328; Pierpont v. C. I. R., 4 Cir., 1964, 336 F.2d 277, 281; Peyton's Estate v. C. I. R., 8 Cir., 1963, 232 F.2d 438, 443-444; Faulkerson's Estate v. United States, 7 Cir., 1962, 301 F.2d 231, 232; M. T. Straight's Trust v. Commissioner of Internal Rev., 8 Cir., 1957, 245 F.2d 327, 329; Merchants National Bank & Trust Co. v. United States, 7 Cir., 1957, 246 F.2d 410, 18; In re Sweet's Estate, 10 Cir., 1956, 234 F.2d 401, 404; Wolfsen v. Smyth, 9 Cir., 1955, 223 F.2d 111, 113-114. Cf. United States v. Farish, 5 Cir., 1966, 360 F.2d [721] 595, 596; Flitcroft v. C. I. R., 9 Cir., 1964, 328 F.2d 449, 454; Darlington's Estate v. C. I. R., 3 Cir., 1962, 302 F.2d 693, 694-695; Pitts v. Hamrick, 4 Cir., 1955, 228 F.2d 486, 491; Gallagher v. Smith, 3 Cir., 1955, 223 F.2d 218, 224; Eisenmenger v. Commissioner of Internal Revenue, 8 Cir., 1944, 145 F.2d 103, 107; Nashville Trust Co. v. Com'r of Internal Revenue, 6 Cir., 1943, 136 F.2d 148, 150-151; Bullard v. Commissioner of Internal Revenue, 7 Cir., 1937, 90 F.2d 144, 147.[11] See contra, C. I. R. v.

[11]The federal courts are not free to disregard a state court judgment simply because both parties have consented to its entry. "[I]t is not necessary that the adjudication be the result of a contest in which one party says yes and another no." Darlington's Estate v. C. I. R., supra, 302 F.2d at 695. Consent decrees are entitled to the same respect accorded any judgment, so long as the parties' interests being compromised and reconciled in the decree are truly adverse.

Estate of Bosch, 2 Cir., 1966, 363 F.2d 1009.

In United States v. Harrison County, Mississippi, 5 Cir., 1968, 399 F.2d 485, we declined to give effect to a decision of the Mississippi Supreme Court concerning title to disputed lands, in part because the decision was in apparent conflict with the Mississippi Constitution. This Court stated, "We assume that this provision was not called to the attention of the Supreme Court of Mississippi, as it is not discussed in the opinion." 399 F.2d at 491. If the absence of any discussion concerning an issue in a case is grounds for declining to follow a state court judgment, the lack of an adversary relationship between the parties is also grounds. See Gilmore v. Greene County Democratic Party Exec. Com., 5 Cir., 1966, 370 F.2d 919, 920; Meredith v. City of Winter Haven, 5 Cir., 1944, 141 F.2d 348, on remand from 320 U.S. 228, 64 S.Ct. 7, 88 L.Ed. 9 (1943).

Dade County points out that the Gilmore and Harris County cases were not diversity cases and are therefore inapplicable. The present case is not a simple diversity case either, being brought under 28 U.S.C. § 1331 (1971) (federal question jurisdiction) as well as section 1332. In any event, we believe that a federal court must insure that its judgments are based only on sound authority established through a truly adversary proceeding.

(15, 16) Respect for the integrity of the courts of the states requires that the federal courts exercise great caution in questioning the nonadversary nature of a state court proceeding. In the present case, however, the Deputy Attorney General of Florida admitted to the District Judge that the relationship between the state boards and Dade County was not an adversary one in the state court mandamus action.[12] Under the circumstances, we are not obliged to follow the state court decision in favor of Dade County.

B. The Meaning of Aerojet's Lease-Option Contract

(17) 1. Inapplicability of the Erie doctrine. Irrespective of the nonadversary nature of the state court proceeding, the meaning of the contract between Aerojet and the Trustees is not controlled by state law, because a violation of the Contract Clause has been alleged, and "the existence of the contract and the nature and extent of its

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[12]The following colloquy occurred during the District Court's hearing on Aerojet's motion for summary judgment:
THE COURT:
The facts in this case just don't bear out your statement. I will agree with you that as far as a decision of this Court is concerned what went on between the Attorney General's Office, the Attorney General of Florida and Dade County has nothing whatsoever to do with this case, but don't attempt to make me think that there weren't some shuffling and finagling going on between Dade County and the Attorney General's office. That is impossible for me to fathom.
MR. RICHARD [Counsel for defendants]:
Your Honor, I would never attempt to tell you that—[.]

obligation become federal questions . . .". Irving Trust Co. v. Day, 314 U.S. 556, 561, 62 S.Ct. 398, 401, 86 L.Ed. 452 (1942). *See* State v. Sims, 341 U.S. 22, 28-29, 71 S.Ct. 557, 560-561, 95 L.Ed. 713 (1951); Atlantic Coast Line R. Co. v. [722] Phillips, 332 U.S. 168, 170, 67 S.Ct. 1584, 1585, 91 L.Ed. 1977 (1947); Higginbotham v. City of Baton Rouge, La., 306 U.S. 535, 538-539, 59 S.Ct. 705, 706, 83 L.Ed. 968 (1939); Coombes v. Getz, 285 U.S. 434, 441, 52 S.Ct. 435, 436, 76 L.Ed. 866 (1932); Larson v. State of South Dakota, 278 U.S. 429 433, 49 S.Ct. 196, 197, 73 L.Ed. 441 (1929); Appleby v. City of New York, 271 U.S. 364, 379-380, 46 S.Ct. 569, 573, 70 L.Ed. 992 (1926); Cone v. Rorick, 5 Cir., 1940, 112 F.2d 894, 897; Florida Power & Light Co. v. City of Miami, 5 Cir., 1938, 98 F.2d 180, 181.[13]

(18) 2. The terms of the agreement. Paragraph 8(a) of the lease-option contract between Aerojet and the Trustees describes in relevant part Aerojet's option to purchase the disputed land:

Upon the election of Lessee (Aerojet), the total amount of the purchase price to be determined, as aforesaid, shall be paid to Lessor simultaneously with delivery to Lessee of a deed to said lands vesting good and merchantable fee simple title thereto in Lessee subject to applicable statutory

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[13]Aaron v. Florida Gas Transmission Company, 5 Cir., 1969, 412 F.2d 802, and Blanton v. Moody, 5 Cir., 1959, 265 F.2d 533, relied on by Dade County, are inapposite. No Contract Clause claim was raised in these cases.

rights and reservations in effect on date of conveyance. (Emphasis added.)

Dade County contends that this clause reserved to the State of Florida the right to affect Aerojet's contract rights by subsequent legislation. It is elementary contract law, however,that a contract should not be construed to yield absurd results:

If one interpretation would lead to an absurd conclusion, then such interpretation should be abandoned and the one adopted which would be in accord with reason and probability. (citations omitted) If the language of a contract is contradictory, obscure or ambiguous, or where its meaning is doubtful so that it is susceptible of two constructions, one of which makes it fair, customary, and such as a prudent man would naturally execute, while the other interpretation would make it unequitable, unnatural, or such as a reasonable man would not be likely to enter into, then the reasonable, logical and rational interpretation should be adopted.

Florida Power Corporation v. City of Tallahassee, 154 Fla. 638, 18 So.2d 671, 674 (1944); see Pritchard v. Norton, 106 U.S. 124, 137, 1 S.Ct. 102, 112, 27 L.Ed. 104 (1882) ("The parties (to a contract) cannot be presumed to have a contemplated a law which would defeat their engagements."); Insurance Company of North America v. Stevens, 5 Cir., 1970, 425 F.2d 704, 705; Connecticut General Life Insurance Company v. Craton, 5 Cir., 1968, 405 F.2d 41, 47-48; Motor Vehicle Casualty Co. v. Atlantic National Ins. Co.,

5 Cir., 1967, 374 F.2d 601, 605. It would be unreasonable to hold that a party would give valuable consideration for an option to purchase which could be nullified at will by the state legislature.

A much sounder interpretation of clause 8 of the contract is that it refers to F.S.A. § 270.11 (1975),[14] which provided for the reservation of certain interests in phosphate, minerals, metals, gas, [723] and oil. In January 1962, Aerojet requested an interpretation of clause 8 of the lease agreement from the Attorney General of Florida. His reply states, "The statutory rights and reservations referred to in the subject portion of this lease with option to purchase are those contemplated in Section 270.11, Florida Statutes."

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[14]270.11 Contracts for sale of public lands to reserve certain mineral rights in state.

In all contracts and deeds for the sale of land executed by the board of trustees of the internal improvement trust fund, there shall be reserved for the board of trustees and its successors an undivided three fourths interest in, and title in and to, an undivided three fourths interest in all the phosphate, minerals and metals that are or may be in, on, or under the said land and an undivided one half interest in all the petroleum that is or may be in, on, or under said land with the privilege to mine and develop the same. The said board of trustees may in its discretion sell or release said reserved interest in or as to any particular parcel of land when such parcel has a building thereon or on which a building is proposed to be erected, and the state board of education may sell or release any such interest which was reserved for said board pursuant to this section prior to September 1, 1967. Such sale or release shall be made on application of the owner of the title to the particular parcel of land with statement of reason justifying such sale or release.

C. Interpretation of F.S.A. § 253.111

1. Statutory construction. Ordinarily we would defer to a state court construction of a state statute. The only available state court construction of F.S.A. § 253.111, however, is the decision in the mandamus action brought by Dade County against the state boards. For the reasons discussed earlier, this nonadversary decision does not bind us in the present case.

(19) The Florida Supreme Court focused on the introductory paragraph of F.S.A. § 253.111, which reads:

> The board of trustees of the internal improvement trust fund of the state shall not sell or convey any land to which they hold title unless and until they shall afford an opportunity to the county in which such land is situated to receive such land for public purposes . . . .
>
> Subparagraph (1) of the section, however, clearly states that the statutory obligation to offer the appropriate county any land the trustees shall sell arises prospectively only:
>
> If an application is filed with the board requesting that they sell certain land to which they hold title and the board shall decide to sell such land or if the board shall, without such application, decide to sell such land the board shall, before consideration of any private offers, notify the board of county commissioners of the county in which such land is situated that such land is available to such county.

(Emphasis added.) In this case the state boards decided to sell the disputed land, by their lease-option agreement with Aerojet in 1961, long before F.S.A. § 253.111 was enacted. Thus they could not possibly have complied with the subsequently enacted provision of F.S.A. § 253.111. There is nothing to indicate that the Florida legislature intended this law to apply retroactively or to interfere with existing contracts.

(20) 2. The Contract Clause issue. Our belief in the correctness of our interpretation of F.S.A. § 253.111 is reinforced by the certainty that if the statute were construed to apply to Aerojet's contract it would violate Article I, Section 10 of the United States Constitution, which declares that no state shall pass any "Law impairing the Obligation of Contracts." See Wood v. Lovett, 313 U.S. 362, 369, 61 S.Ct. 983, 986, 85 L.Ed. 1404 (1941); Appleby v. City of New York, 271 U.S. 364, 382-397, 46 S.Ct. 569, 574-579, 70 L.Ed. 992 (1926); McGuire v. Sadler, 5 Cir., 1964, 337 F.2d 902, 905-906. Any other interpretation would clearly violate the Contract Clause and require us to hold the statute unconstitutional as applied in the circumstances here.

Affirmed.

RONEY, Circuit Judge (specially concurring):

I concur in the result reached by Judge Ainsworth's opinion and most of what it says. I have serious doubt as to the decision that the Trustees of the Internal Improve-

ment Fund and Dade County were in such relationship as to make the first lawsuit res judicata as to Dade County. Concurring in the decision that F.S.A. § 253.111 cannot constitutionally prevent the relief granted to Aerojet in this case, however, makes my difference as to the res judicata effect of the first lawsuit of no consequence.

APPENDIX D

APPENDIX D

[901]

AEROJET-GENERAL CORP., an Ohio corporation,
Plaintiff,

v.

Reubin O'Donovan ASKEW, Governor of the State of Florida, et al.,
Defendants.

METROPOLITAN DADE COUNTY, a Political Subdivision of the State of Florida,
Plaintiff,

v.

AEROJET-GENERAL CORPORATION, an Ohio corporation and any and all persons having or claiming any right, title or interest in and to the real property described herein,
Defendant.

Civ. A. Nos. 1831, 73-33.
United States District Court,
N. D. Florida.
Nov. 21, 1973.

Action by corporation, which had lease with option to purchase state agency lands and which had obtained federal court judgment, affirmed on appeal, for specific

performance, for declaratory and injunctive relief, wherein county, which claimed lands under subsequently enacted statute giving counties opportunity to acquire such lands and which had obtained deed from agency pursuant to mandamus judgment of state Supreme Court, sought, with others to quiet title. The case was presented on motions for summary judgment. The District Court, Middlebrooks, J., held that the county was bound by the judgment in the specific performance action, although it was not a party to the action, that application of the statute would impair obligation of contract, and that equitable considerations did not favor the county.

Judgment accordingly.

See also 5 Cir., 476 F.Supp. 184.

1. States — 89

Provision in lease with option to purchase land belonging to state agencies, conditioning exercise of option upon certain unnamed statutory rights and reservations, did not contemplate subsequent enactment of statute giving counties opportunity to receive such lands for public purposes, particularly in view of intervening opinion of Attorney General limiting effect of contract provision to certain other statute. F.S.A. §§ 253.111, 270.11.

2. Constitutional Law — 123

Florida statute giving counties opportunity to receive land belonging to state agencies was merely in the general welfare and not so in the public interest as to justify impairment of rights under previously granted lease with option to purchase. F.S.A. § 253.111; U.S.C.A. Const. art. 1, § 10.

3. Courts — 359(2), 370(1)

Federal courts must apply law of forum state in diversity cases but only if there is authority from state's highest court in regard to contested issue.

4. Judgment — 828(3.24)

Florida Supreme Court judgment in mandamus directing state board to offer land (which was subject of lease with option to purchase by private corporation) to county, pursuant to subsequently enacted statute, without specifically discussing any matters pertinent to private corporation's specific performance action in federal court, was not res judicata [902] in later federal action involving respective rights of corporation and county in land.

5. Judgment — 675(1)

Amicus curiae is not bound by judgment.

6. Judgment — 713(2)

Judgment for corporation in its action against state agency for specific performance of contract to purchase agencies' land was res judicata as to subsequent action involving respective rights of corporation and of county, which claimed land under statute giving counties opportunity to acquire such land, although question of statute was not specifically raised in specific performance action since question was sufficiently related to subject matter and relevant to issues that it could have been raised. F.S.A. § 253.111.

7. Judgment — 677

County, which received monies in lieu of taxes from corporation which had lease with option to purchase state agency lands, was bound by judgment for corporation in specific performance action against agency, although it was not a party of record, where agency was acting on behalf of people of state, including county, and county succeeded to agency's interest in land. F.S.A. § 253.111.

8. Judgment — 677

Person whose interest was validly represented in suit is bound by resulting judgment even though he was not a party.

9. Judgment — 681

Successors to property interest are bound by judgments in prior litigation concerning that interest since policy favoring final settlement of controversies requires that transferee should not be allowed to raise anew questions previously litigated concerning subject matter of transfer.

10. States — 89

County which not only had knowledge of corporation's adverse claim to state agency land but knew of order granting corporation title at time it took deed from agency was not a bona fide purchaser.

11. Quieting Title — 3

County, which claimed state agency land pursuant to statute enacted after agency granted private corporation a lease with option to purchase, had no equitable claim for relief as against corporation where county had accepted from corporation payments in lieu of taxes, pursuant to lease option, county delayed in asserting its statutory rights and did not comply with statutory requirement that it specify public purpose, corporation made extensive investment, and corporation had benefit of federal Court of Appeals judgment.

George W. Wright, Jr., Mershon, Sawyer, Johnston,

Dunwody & Cole, Karl B. Block, Jr., Miami, Fla., J. W. Moore, Yale Law School, for Aerojet-General Corp.

Robert Shevin, Atty. Gen., Barry S. Richard, Deputy Atty. Gen., for Board of Trustees of Internal Improvement Trust Fund.

Stuart Simon, Dade County Atty., Alan T. Dimond, Asst. County Atty., Thomas C. Britton of Shutts & Bowen, Miami, Fla. (special counsel), for Metropolitan Dade County.

OPINION — ORDER

MIDDLEBROOKS, District Judge.

These causes are before the Court upon cross motions for summary judgment by the parties in the action by Aerojet for declaratory and injunctive relief and the action by Metropolitan Dade County and others to quiet title to the subject lands. The parties having stipulated that there are no material factual disputes and that all legal issues necessary for the disposition of these matters have been presented, the Court enters the following findings of fact and conclusions of law as may be required by Rule 52, Federal Rules of Civil Procedure.

[903]

FINDINGS OF FACT

1. The State of Florida Board of Education and The State of Florida Board of Trustees of the Internal Improvement Trust Fund are each composed of the following officials: Governor, Secretary of State, Attorney General, Comptroller, Treasurer, Commissioner of Agriculture and Commissioner of Education. Sections 229.012 and 253.02(1) Florida Statutes Annotated. In September and October, 1961, these two bodies caused to be published in the Homestead News, a newspaper of general circulation in Dade County, Florida, a Notice of Bids and Public Sale by means of which bids were solicited for the lease and/or purchase of lands owned by the two boards of Dade County. Approximately 25,313 acres of land were and are involved. Aerojet was considered the successful bidder.

2. On December 21, 1961, the Aerojet-General Corporation (hereafter Aerojet), an Ohio Corporation doing business in the State of Florida, entered into a written lease with option to purchase the leased lands at Fifty Dollars ($50.00) per acre. The ten (10) year lease-option agreement provided, generally, that Aerojet agreed to pay the sum of Two Dollar and Fifty Cents ($2.50) per acre during the lease; that Aerojet would pay annually the amount equal to and considered as in lieu of ad valorem taxes payable on the lands; and that said payments were to continue through the lease period or until purchase of the lands by

the lessee Aerojet. More specifically, the agreement provided in Paragraph 8 as follows:

"(a) Upon the election of Lessee, the total amount of the purchase price to be determined, as aforesaid, shall be paid to Lessor simultaneously with delivery to Lessee of a deed to said lands vesting good and merchantable fee simple title thereto in Lessee subject only to applicable statutory rights and reservations in effect on the date of conveyance and the covenant on the part of the Lessee to be kept and performed contained in Paragraph 5 above".

3. On January 15, 1962, Attorney General Richard W. Ervin, now Florida Supreme Court Justice, wrote to Mr. J. T. Williams, State Land Office Record Clerk, replying to Williams' query concerning the release of statutory reservation referred to in paragraph 8 of the Aerojet lease-option agreement. In pertinent part the text of the memorandum from Attorney General Ervin is as follows:

"The statutory rights and reservations referred to in subject portion of this lease with option to purchase are those contemplated in Section 270.11, Florida Statutes (F.S.A.)."

Florida Statutes, Section 270.11, F.S.A., provides for the reservation in the Board of Trustees of

"(A)n undivided three-fourths interest in and title in and to, an undivided three-fourths interest in all the phosphate, minerals and metals that are or may be in, on or

under the said land and an undivided one-half interest in all the petroleum that is or may be in, on or under said land with the privilege to mine and develop the same. . . ."

4. In addition to leasing these certain lands from the state boards, Aerojet purchased additional land surrounding the state land at an expenditure of Seven Million Dollars ($7,000,000.00). In early 1962, Aerojet began construction of a plant for the development of solid rocket fuels which resulted in a capital investment on Aerojet's part for buildings and equipment of Twenty One Million Two Hundred Thousand Dollars ($21,200,000.00). About Two Million Dollars ($2,000,000.00) of this construction was completed on the leased lands in the spring of 1964, and was in operation until June, 1967, at which time it ceased operations due to cutbacks in the federal government spending on solid rocket fuel research and development. Subsequent to June, 1967, Aerojet maintained a caretaker force at these facilities.

[904] 5. The Florida Legislature in 1965, enacted what is now Section 253.111, Florida Statutes Annotated, which in part provides:

"The board of trustees of the internal improvement trust fund of the state shall not sell or convey any land to which they hold title unless and until they shall afford an opportunity to the county in which such land is situated to receive such land for public purposes. . ." (Chapter 65-324, Laws of Florida.)

6. On September 8, 1969, Aerojet notified the members of the state boards in writing that it had elected to exercise its option to purchase the lands which were described in the lease-option agreement. Prior to that date Aerojet had paid over Five Hundred Thousand Dollars ($500,000.00) in yearly rentals under the agreement and Two Hundred Thirty One Thousand Dollars ($231,000.00) to Dade County in lieu of ad valorem taxes. Payments under the lease were current in all respects. At no time prior to the "notify" date, September 8, 1969, had the members of the state boards or their predecessors in office notified Aerojet or even intimated to it that Aerojet had failed in any way whatever to comply with the terms of the lease.

7. At a meeting of the State Board of Education and of the Board of Trustees of the Internal Improvement Trust Fund on October 21, 1969, it was decided not to convey the land to Aerojet.

8. Subsequently, on October 21, 1969, Aerojet brought suit in this Court against members of the state boards seeking a decree of specific performance of the purchase option contained in the lease option agreement. On September 21, 1970, this Court granted Aerojet's motion for summary judgment. Aerojet-General Corporation v. Kirk, 318 F.Supp. 55 (N.D.Fla.1970). The members of the state boards took a timely appeal to the United States Court of Appeals for the Fifth Circuit from this Court's summary judgment and decree of specific performance. On December 9, 1971, the Court of Appeals affirmed this Court's order. Aerojet-General Corporation v. Askew,

453 F.2d 819 (5th Cir. 1971). The United States Supreme Court on October 10, 1972, denied the state board members' petition for writ of certiorari. 409 U.S. 892, 93 S.Ct. 110, 34 L.Ed.2d 149.

9. Upon failure of the state boards to comply with the order of this Court to convey the land to Aerojet, this Court on June 20, 1972, appointed a Commissioner for the purpose of executing a deed to the lands described in the lease-option agreement in favor of Aerojet. Upon receipt of a cashier's check in the amount of One Million Two Hundred Forty Six Thousand Three Hundred Eight and 88/100 Dollars ($1,246,308.88) drawn on the First National Bank of Miami, and made payable to the State of Florida Board of Trustees of the Internal Improvement Trust Fund and the State of Florida Board of Education, a deed was executed and delivered to Aerojet.

10. On June 9, 1972, Metropolitan Dade County instituted a mandamus proceeding in the Supreme Court of Florida against the members of the state boards alleging its rights pursuant to Section 253.111, F.S.A., to acquire the "Aerojet lands" for public purposes; Aerojet was not made a party to these proceedings. Dade County contended that its right under the statute was "prior to and supersedes any right of interest of Aerojet General Corporation to acquire these lands." The members of the state boards on June 22, 1972, filed their return in the mandamus action reciting the following:

"At the time the petition (mandamus) was filed, respondents were under order of the United States District Court for the Northern District of Florida, issued on June 7, 1972, pursuant to Rule 70, Federal Rules of Civil Procedure, to deed the land in question to Aerojet-General Corporation within fifteen days.

"Pursuant to that order a fee simple deed was executed and delivered [905] by the appointed commissioner to Aerojet-General Corporation on June 21, 1972."

However, on October 11, 1972, the Florida Supreme Court issued the writ of mandamus sought by Dade County against the members of the state boards. State ex rel. Metropolitan Dade County v. Askew et al., 267 So.2d 827 (Fla. 1972).

The Board of Trustees of the Internal Improvement Trust Fund was ordered to offer the land to Dade County in accordance with the provisions of Section 253.111, F.S.A. No mention was made with regard to those lands held by the State Board of Education. And the Florida Court specifically did not discuss any of the matters pertinent to the specific performance suit before this Court. Rather, the basis for the issuance of the writ was stated as follows:

"(O)ur study of the contract itself leads us to conclude that the parties intended that subsequently enacted statutes be taken into consideration." 267 So.2d 827 at 829."

11. On June 20, 1972, the day before Aerojet received its Commissioner's deed, Aerojet instituted case No. 1831 in this Court seeking an adjudication of the rights of Dade County to the lands encompassed by the Commissioner's deed.

12. On October 31, 1972, pursuant to the results of the action before the Florida Supreme Court, the Board of County Commissioners of Metropolitan Dade County, Florida, passed a resolution pursuant to Section 253.111, F.S.A., offering to buy the disputed lands from the state boards—even though only the Trustees had been directed to offer the lands for sale. A check in the amount of One Million Two Hundred Forty Six Thousand Three Hundred Eight and No/100 Dollars ($1,246,308.00) was tendered to the members of the state boards. (This exact amount was paid to the boards by Aerojet). The state boards voted to accept the Dade County purchase offer and a deed was executed and delivered to Dade County.

13. Subsequently, this Court enjoined Dade County from recording its newly acquired deed to the disputed lands. In addition, Aerojet was enjoined from conveying any part of the property and Dade was further enjoined from instituting any action to quiet title to that property. Aerojet-General Corporation v. Askew, 355 F.Supp. 928 (N.D.Fla. 1973).

14. This Court modified its injunctions against Dade County's recording of its deed from the Trustees and institution of a quiet title action and on approximately January

10, 1973, Dade County instituted a quiet title action in the Eleventh Circuit Court of Florida, in and for Dade County. Aerojet, named a party defendant in that action, removed the matter to the United States District Court for the Southern District of Florida. Additionally, Aerojet appealed this Court's order modifying the injunctions to the Court of Appeals for the Fifth Circuit. On March 5, 1973, the Court of Appeals, 476 F.2d 184, reinstated this Court's injunction against any suits challenging Aerojet's title so that this Court could consider the merits of Aerojet's declaratory action initiated in this Court on June 20, 1972. Subsequently, Aerojet's action and Dade County's quiet title action were consolidated for disposition by this Court.

15. In the action now pending before this Court, both Aerojet and Dade County have moved for summary judgment. This Court on August 22, 1973, heard oral argument with respect to the cross motions for summary judgment, at the outset of which the parties stipulated on the record that the respective motions encompassed all the issues bearing upon the ultimate disposition of this litigation. This Court has dismissed the quiet title action instituted by Dade County and has allowed Dade County to file a counterclaim in the Aerojet declaratory action, such counterclaim seeking for Dade County the same relief sought [906] by Aerojet with respect to the disputed lands.

CONCLUSIONS OF LAW
I. IMPAIRMENT OF CONTRACT

Turning first to the position of Dade County that the application of Section 253.111, F.S.A., is not barred by the principles of impairment of contract, this Court would review the decision of the Supreme Court in Wood v. Lovett, 313 U.S. 362, 61 S.Ct. 983, 85 L.Ed. 1404 (1940). In Wood, supra, the Court sought to deal with a 1937 Act of the Arkansas legislature which repealed an Act passed by that body in 1935. The 1935 Act had as its purpose to give assurance to prospective purchasers of lands from the state, which lands had been forfeited to the state because of delinquent taxes, a certain immunity from attacks on their title. In effect, the state sought to guarantee the title to these purchasers. As in the case before this Court, the Supreme Court faced the question of whether the state granted a valuable right which it subsequently essayed to take away. The Court noted that:

"The federal and state court have held, with practical unanimity, that any substantial alteration by subsequent legislation of the rights of a purchaser at tax sale, accruing to him under laws in force at the time of his purchase, is void as impairing the obligation of contract." Wood, supra, page 369, 61 S.Ct. at 986.

The Court held that the repeal of the 1935 Act impaired the obligation of the appellants' contracts with the state in violation of Art. I, § 10 of the United States Constitution. (It is interesting to observe that the "statute and the

protection it afforded" was found to constitute a contract between the state and the aggrieved individuals.) See also Appleby v. New York City, 271 U.S. 364, 46 S.Ct. 569, 70 L.Ed. 992 (1925) (wherein the Supreme Court held that the City's grant of land under water made to Appleby with the full sanction of the legislature, could not be impaired by subsequent legislation.)

If the case before this Court involved simply whether Section 253.111, F.S.A. could apply to foreclose certain rights granted back in 1961, the question would be quickly answered in the negative. But the instant lawsuit differs in that Dade County points to the language in paragraph 8 of the lease-option agreement, which conditions the exercise of the option upon certain unnamed statutory rights and reservations, and argues that the parties thereby contemplated such a statute as Statutes, Section 253.111, F.S.A., and in effect consented to such an eventuality in the guise of a legitimate abridgement in the public interest. A key question comes to mind: Would Aerojet have committed itself to a multi-million dollar investment if in fact it had contemplated such a possibility?

(1) In regard to the proposition that in fact Aerojet did in 1961, contemplate its demise, this Court is obliged to consider the rationale in Mobil Oil v. Oil Chemicals and Atomic Workers Union, 483 F.2d 603, 5th Cir. 1973. In this case the Fifth Circuit considered the validity of an agency shop clause in a union negotiated agreement with Mobil Oil Company in the State of New York. The company had moved its operations into the State of Texas where by state statute agency shop clauses are precluded. Mobil Oil there sought to argue the invalidity of the provision. The Court, noting that the parties freely chose to be covered by an agency shop clause, found that "They cannot be presumed to have contemplated a law which would defeat their engagement." Mobil Oil, supra. Dade County argues in the case before this Court that Aerojet by the lease-option agreement contemplated a law which would be at least ruinous. It cannot be. This is especially true since on January 15, 1962, some seven (7) years prior to the exercise of the option by Aerojet, the Attorney General of Florida, the chief legal officer of the state, [907] issued his opinion stating that the "applicable statutory rights and reservations referred to . . . are those contemplated in Section 270.111 (270.11), Florida Statutes (F.S.A.)."

(2) Dade County argues secondly, even if Aerojet did not consent to the application of Section 253.111 F.S.A., the operation of such was "in the public interest" and therefore a justified impairment. Dade County cites El Paso v. Simmons, 379 U.S. 497, 85 S.Ct. 577, 13 L.Ed.2d 446 (1964). The Supreme Court in El Paso considered a statute which restricted a previously unlimited time period in which to reinstate claims to forfeited lands in Texas. In finding for the City of El Paso, the Court noted that "we think the objects of the Texas statute make abundantly clear that it impairs no protected right under the Contract Clause." p. 509, 85 S.Ct. p. 584. Interestingly, the "object" of the statute or the legitimate interest of the public in the

El Paso case was the same interest which the Court dealt with and protected in Wood, supra. In both situations the statutes involved sought to restore confidence in the stability and integrity of land titles issued by the state.[1] Unfortunately for Dade County, the same public interest is not in controversy in the case at bar. Being merely in the domain of the reserve power of a state, i. e., the general welfare of the people, is not in itself sufficient;

"As Mr. Justice Johnson said in Ogden v. Saunders, '(i)t is the motive, the policy, the object, that must characterize the legislative act, to affect it with the imputation of violating the obligation of contracts.' 12 Wheat. 213, 291, 6 L.Ed. 606." El Paso, supra, at 509, 85 S.Ct. at 584.

This Court must then search for the "public interest" which Dade County alleges is served even as Aerojet is offered up to Asmodeus.

The opinion in Home Building & Loan Assn. v. Blaisdell, 290 U.S. 398, 54 S.Ct. 231, 78 L.Ed. 413 (1934), amounts to the comprehensive restatement of principles underlying the application of the Contract Clause. No doubt after the Blaisdell opinion it is undisputed "that the prohibition is not an absolute one and is not to be read with literal exactness like a mathematical formula." Blaisdell, supra, at 428. But certainly only specific interests

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[1]Arguably, Aerojet could maintain that the statute threatens the confidence in the integrity of land titles issued by the state.

justify the exercise of a continuing and dominant power by the state notwithstanding interference with contracts. Generally and historically the state retains the requisite "residuum of power" to protect the public health against the maintenance of nuisances, Fertilizing Co. v. Hyde Park, 97 U.S. 659, 24 L.Ed. 1036 (1878); Butchers' Union Co. v. Crescent City Co., 111 U.S. 746, 4 S.Ct. 652, 28 L.Ed. 585 (1883); to protect the public morals, Stone v. Mississippi, 101 U.S. 814, 25 L.Ed. 1079 (1879); Beer Co. v. Massachusetts, 97 U.S. 25, 24 L.Ed. 989 (1877); to protect the public safety, Chicago B. & Q. Railroad Co. v. Nebraska, 170 U.S. 57, 18 S.Ct. 513, 42 L.Ed 948 (1897); and to protect certain economic interests of the state, Manigault v. Springs, 199 U.S. 473, 26 S.Ct. 127, 50 L.Ed. 274 (1905). "This power, which in its various ramifications is known as the police power, is an exercise of the sovereign right of the government to protect the lives, health, morals, comfort, and general welfare of the people . . ." Manigault, supra, at 480, 26 S.Ct. at 130.

The contested statute in the instant case and that upon which Dade County predicates its claim provides only that the County shall have an opportunity to "receive such lands for public purposes." Section 253.111, F.S.A. "Public purposes" under the Florida Statutes is not necessarily co-extensive or tantamount to the "public interests" protected by the exception to the Contract Clause and the Court notes additionally that Dade County has not sought to urge upon this Court the specific "interests" of the state which are [908] being protected herein. It is the view of

the Court that the factual setting of this matter is not in parity with the interests heretofore protected by the Supreme Court in construing the Contract Clause and thus the statute is not a legitimate impairment of Aerojet's lease-option agreement.

II. RES JUDICATA

(3-5) In regard to the claim by Dade County that the doctrine of res judicata is not applicable, this Court would concede that federal courts are required to apply the law of the forum state in diversity cases, but only if there is authority from that state's highest court in regard to the contested issue. Breeland v. Security Insurance Company of New Haven, Connecticut, 421 F.2d 918. 921 (5th Cir., 1969). In the Breeland case, however, the Fifth Circuit there construed the case as it thought the highest court in Louisiana might have done since there was no state pronouncement. While it may be that there is Florida authority with regard to the issue of res judicata, it is the view of this Court that the recent mandamus action before the Florida Supreme Court on certain facts relevant to this case simply is not such authority, implicitly or otherwise. It is certainly well settled that Aerojet as an amicus curiae would not be bound. Moore's Federal Practice 0.411 (6), 1551.

In State ex rel. Walker v. Gessner, 157 Fla. 798, 26 So.2d 896 (1946), the Florida Supreme Court considered a mandamus action to compel county commission officials

to call an election in Volusia County. The appellants, movants in the mandamus action, claimed that they were not bound by an earlier injunction which resulted in permanently enjoining the election. The Florida court held that though appellants were not parties to the injunctive proceeding, they were bound thereby as members of the public who were each bound by the injunctive proceedings in a matter of general interest to all the people of the county.

Similarly, in Young v. Miami Beach Improvement Co., 46 So.2d 26 (Fla. 1950), the Florida Court held that members of the public though they had not been parties to an earlier suit (wherein it was held that the city was estopped to assert that there had been activity or conduct tantamount to a dedication of certain beach property), were nevertheless each themselves estopped to make such claims. The Court stated the applicable principle of law as follows:

"A judgment against a municipal corporation in a matter of general interest to all its citizens is binding on the latter, although they are not parties to the suit. Every taxpayer is a real, although not a nominal, party to such judgment, and cannot relitigate any of the questions which were litigated in the original action against the municipality, or its legal representatives and if the municipality fails to avail itself of legal defenses, the people are concluded by the judgment." (Citations omitted) Young, supra, at 30.

The aforesaid principle of law has been restated and reaffirmed in Florida appellate courts as recently as 1962 in City of New Port Richey v. State ex rel. O'Malley, 145 So.2d 903, 906 (Fla.App. 1962). If the analogy is accurate the principles of law enunicated above suggest that the County whose interest was certainly in question in the earlier specific performance action before this Court and in a matter of substantial public interest, should not now be heard to contest the results of those proceedings.

The Supreme Court of Florida in Donahue v. Davis, 68 So.2d 163 (Fla. 1953), recognized the following four conditions that must concur before the doctrine of res judicata can be applied:

"The rule is well settled that in order to make res judicata four conditions must concur, namely: (1) Identity in the thing sued for; (2) identity of the cause of action; (3) identity of persons and parties to the action, and (4) identity of the quality in the person for or against whom the [909] claim is made. Brundage v. O'Berry, 101 Fla. 320, 134 So. 520; Gray v. Gray, 91 Fla 103, 107 So. 261." Donahue, supra, at 169.

The Florida appellate courts expressed the rule in Reynolds v. Reynolds, 117 So.2d 16 (Fla.App. 1959):

"In order for the defense of res judicata to prevail the final judgment or decree relied upon must reflect within its four corners matters from which it can be determined that the second suit is (1) upon the same cause

of action, (2) between the same parties as the first, and (3) that the final judgment in the first suit upon the merits is conclusive in the second suit as to every question that was presented or might have been presented and determined in the first suit." Reynolds, supra, at 20.

Essentially, the same test was adopted by the Fifth Circuit in Astron Industrial Associates, Inc. v. Chrysler Motors Corp., 405 F.2d 958 (5th Cir. 1968). In Astron the Court dealt with the problem which confronts this Court, i. e., the identity of two lawsuits. That Court offered the following language as a means to apply the standard "identity" tests:

"In regard to the identity of the two lawsuits, it is the substance of the actions that must be compared and not their form. Acree v. Air Line Pilots Association, 5 Cir. 1968, 390 F.2d 199 (Wright, J., sitting by designation); Wilson Cypress v. Atlantic Coast Line R. Co., 5 Cir. 1940, 109 F.2d 623. However, there is no one generally accepted test applicable to all situations for determining identity.

'In deciding whether the substances of two actions are for res judicata purposes the same, various tests have been advanced: Is the same right infringed by the same wrong? Would a different judgment obtained in the second action impair rights under the first judgment? Would the same evidence sustain both judgments?' Acree v. Air Line Pilots Association, 5 Cir. 1968, 390 F.2d 199, 201." Astron, supra at 961.

(6) The parties in the matter before this Court seemingly concede that res judicata would be applicable but for the question of the identity of the parties, Dade County contending, of course, that it is not bound by the former specific performance judgment of this Court. It is true that the question of the applicability of the Section 253.111, F.S.A., was not specifically raised previously. However, this Court finds that the question raised by that statute is sufficiently "related to the subject matter and relevant to the issues" such that it could have been raised in the first suit and thus judgment is conclusive on it despite the fact that it was not expressly pleaded or otherwise urged. Angel v. Bullington, 330 U.S. 183, 67 S.Ct. 657, 91 L.Ed. 832 (1947); Moore's Federal Practice, Vol. 1B, § 0.443(2), p. 3903. It is well settled additionally, that a litigant cannot resort to piecemeal litigation.

"A party . . . is not at liberty to split up his demand and prosecute it by piecemeal, or present only a portion of the grounds upon which special relief is sought, and leave the rest to be presented in a second suit, if the first fail. There would be no end to the litigation if such a practice were permissible." Baltimore S.S. Co. v. Phillips, 274 U.S. 316, 320, 47 S.Ct. 600, 602, 71 L.Ed. 1069 (1927), citing the general doctrine stated in Stark v. Starr, 94 U.S. 477, 485, 24 L.Ed. 276 (1876).

Dade County resists the determination of "identity" asserting principally that it was not in "privity with the Trustees" (party to the first suit) and that the Trustees

were not authorized to raise matters in their defense by the doctrine of virtual representation.

The operative facts are not in dispute. The applicability of the Florida Statute could have been raised by the Trustees [910] in the first suit but was not.[2] The County was a recipient of monies from Aerojet paid in lieu of ad valorem taxes pursuant to the agreement between the Trustees and Aerojet. Later the County became grantee of the deed from the Trustees with knowledge that this Court had ordered the deed to be given to Aerojet and in fact with knowledge that Aerojet had a Commissioner's Deed to the lands. At this date Dade County's claim is principally predicated upon the language in the agreement between the Trustees and Aerojet although its specific right to the lands is alleged to be statutory.

(7) It is the view of this Court, first of all, that Dade County though not a party of record in the first proceeding, was in such close relationship to the parties to the first lawsuit before this Court, that its interests or the interests of those which it represents, were represented in that proceeding.

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[2]The memorandum of the Attorney General of Florida, Earl Faircloth, to the Board of Trustees of Internal Improvement Trust Fund and the Department of Education on October 14, 1969, one week prior to the decision of the state boards not to convey the land to Aerojet, specifically indicates that the parties had knowledge of the existence and function of Section 253.111, F.S.A. Obviously the state boards chose not to raise it as an affirmative defense.

(8) The principles of law recognized by the Supreme Court in Chicago, R. I. & P. Ry. v. Schendel, 270 U.S. 611, 46 S.Ct. 420, 70 L.Ed. 757 (1926), are persuasive in this matter. The Schendel doctrine is a corollary of the doctrine of privity under which a person whose interest was validly represented in a suit is bound by the resulting judgment even though he was not a party to the suit. Schendel, supra, at 620, 46 S.Ct. 420. See also Moore's Federal Practice, Vol. IB, § 0.411(3), p. 1423 and Restatement of Judgments § 80b (1942). It is clear that the Trustees, as they are charged to do, were contemplating and acting on behalf of the people of the State of Florida in the first proceeding before this Court. The third defense offered by the Trustees in their answer to the complaint recited the fact of this representation. Dade County, who can only purport to be representing the same interests, i.e., of people in Florida living in Dade County, seeks to allege that these interests are either somewhat different or that somehow interests of the people of Dade County were in conflict with those of the Trustees. Presumably, the "conflict" which the County seeks to interpose arises from the necessity to purchase the lands from the Trustees. First of all, the Court notes that the statute does not specifically require a "purchase price". Secondly, even if such a purchase were contemplated by the statute, the "conflict" argument diminishes into nothingness when considered in view of the "purchase price" agreed upon by the two entities. The conflict is certainly less than a "lion in the path." Nonetheless, the entire argument of differing interests of members of the public seems foreclosed by State ex rel.

Walker v. Gessner, supra, and Young v. Miami Beach Improvement Co., supra.

(9, 10) This Court feels that "identity of the parties" is necessitated for a second reason: Since Dade County was a "successor in interest to the same right of property" as that in the Trustees, it cannot be heard now to argue that it did not become bound by the judgment affecting that interest particularly since the County took subsequent to and with knowledge of that proceeding. The policy favoring final settlement of controversies requires that a transferee of property should not be allowed to raise anew questions previously litigated concerning the subject matter of the transfer. Consequently, by traditional concepts of privity, successors to a property interest are bound by judgments in prior litigation concerning that interest. Moyer v. Mathas, 458 F.2d 431 (5th Cir. 1972). The conflicting policy of protecting bona fide purchasers simply is not available here. The County [911] not only had knowledge of Aerojet's adverse claim but of this Court's order granting Aerojet title at the time it took the deed in question from the Trustees.

For the reasons above mentioned, this Court finds that Dade County was sufficiently in privity with the Trustees such that its claims here are susceptible to the bar of res judicata.

III. EQUITY

For perhaps a third reason this Court is unwilling and unable to favor the claims of Dade County—that is equity. It has been stated:

"Equity is a roguish thing . . . . Equity is according to the conscience of him that is chancellor, and as that is larger or narrower, so is Equity."
John Selden. Table Talk (1689)

The Court has over the past several years had opportunity to consider the facts of this lawsuit on numerous occasions Some of these "facts" when viewed in terms of entitlement to equitable relief appear at least of a vexatious quality to this Court. While not in themselves sufficient to serve as a basis for this Court's findings in the foregoing sections, these facts are cognizable before a court sitting in equity and thus will be mentioned in this discussion.

Preliminarily, the Court would note that regardless of how the parties to the original 1961 transaction judge the wisdom of that agreement today, at the time certainly both parties were satisfied with the prospects of the venture. The subsequent failure of the solid rocket fuel industry no doubt raised reasonable concern by the state boards with regard to the continuing validity of the contract and the issues were properly litigated. Those questions were resolved very clearly in favor of Aerojet and the matter of the disputed deed should have rested. In

the spirit then of equity the Court would point out these relevant "facts": Dade County was a beneficiary under the original agreement between the state boards and Aerojet. The County received Two Hundred Thirty One Thousand Dollars ($231,000.00) from Aerojet under paragraph 7 of the lease-option agreement in lieu of ad valorem taxes, yet seeks standing before this Court to contest (and has opposed in the Florida Supreme Court) the very provision in the lease-option agreement making the payments to Dade County a viable venture for Aerojet. The "purchase option" provision is essentially what Aerojet purchased in 1961; Dade County accepted its monies thereunder and now seeks to contest the validity of that provision. Secondly, the Court would point out that the County was in effect made a beneficiary of Section 253.111, F.S.A., in the year 1965. Yet the County did not seek to assert its "rights" thereunder until June 9, 1972, a date two and a half years after Aerojet began its litigation with respect to the very interest Dade County claimed. The June 9, 1972, date was also two days after this Court had ordered the deed to the lands issued to Aerojet. Thirdly, in its action before the Florida Supreme Court in June 1972, the County alleged that these lands were "needed and desired by the County for public purposes" and thereby sought to invoke the Section 253.111, F.S.A., language. But even at this date the County has not complied with the obligation incumbent upon it by the very statute which it seeks to impose upon others. The record in this case does not reflect any decisions on the part of the Dade County commissioners with regard to the particular public

"use" to be made of the land in question nor has there been a tentative plan of development or timetable produced as evidence of compliance with the statute. Indeed this Court has been furnished no evidence that the state ever notified Dade County of the availability of the lands subsequent to the enactment of the statute. All of these factors can suggest only of the inapplicability of the Section 253.111, F.S.A.

Most significantly, perhaps, the Court would point out that pursuant to the initial [912] agreement Aerojet undertook a Twenty One Million Dollar ($21,000,000.00) capital investment. At least Two Million Dollars ($2,000,000.00) of such investment was invested in buildings and equipment on the leased lands now in dispute. Additionally, Aerojet's commitment under the agreement called for a purchase price of One Million Two Hundred Forty Six Thousand Three Hundred Eight Dollars ($1,246,308.00) upon its exercise of the option, representing Fifty Dollars ($50.00) per acre. This amount has been hotly contested by the County and the Trustees as being too low. Yet the exact amount of One Million Two Hundred Forty Six Thousand Three Hundred Eight Dollars ($1,246,308.00) was proposed by Dade County and accepted by the Trustees in the sale of the lands between those entities on October 31, 1972. And it is interesting to note that in all of these proceedings there has been no thought of any compensation to Aerojet.

Finally it is important to point out that the briefs in

this case have not suggested what steps could be taken by this Court if a decision favorable to Dade County were forthcoming. Essentially Dade County is asking this Court to set aside not only a "local" transaction but a judgment of the Court of Appeals for the Fifth Circuit, which specifically affirmed that transaction. Notwithstanding the legal conclusions of this Court, the dilemma into which this Court is placed by the relief request simply cannot be solved in favor of Dade County.

(11) It is the view of the Court that Dade County has no equitable claim for relief. However, even if Dade County did have a legitimate equitable claim it would be of questionable value before this Court which feels bound by the appellate decision in this matter. The Fifth Circuit in Aerojet-General Corporation v. Askew, 453 F.2d 819, 836 (5th Cir. 1971), stated that:

"At this late date, after the plaintiff has in good faith made the required payments and dispatched the required notices of election necessary to exercise its option to purchase, we hold that Aerojet is entitled to prevail in the absence of specific charges of 'actual fraud, misconduct, favoritism, prejudice, or discrimination' ".

This Court would agree. It is therefore.

Ordered:

1. The motion of Dade Conty for summary judgment be and it is hereby denied.

2. The motion of Aerojet to dismiss the quiet title suit, Tallahassee Civil Action No. 73-33, be and it is hereby granted; the complaint in that action filed on behalf of Metropolitan Dade County is hereby dismissed with prejudice to Metropolitan Dade County.

3. The motion of Aerojet for summary judgment be and it is hereby granted. In the absence of a genuine dispute of material fact and Aerojet being entitled to relief as a matter of law, summary final judgment is hereby entered in favor of Aerojet-General Corporation and against the Board of Trustees of the Internal Improvement Trust Fund of the State of Florida and the Commissioners of Metropolitan Dade County as and constituting the Board of County Commissioners of Metropolitan Dade County, Florida.

4. Pursuant to Paragraph 3 above, the instrument entitled "Deed No. 25347", dated October 31, 1972, from the Trustees to Metropolitan Dade County, encompassing the same lands described in this Court's Commissioner's Deed of June 20, 1972, is null and void and of no force or effect. Said Deed shall forthwith be delivered to the Clerk of this Court to be held pending further order of this Court.

5. The funds of Dade County heretofore paid and delivered to the Trustees on or about October 31, 1972, in exchange for the aforesaid instrument entitled "Deed No. 25347" shall be returned and refunded by the Trustees to Dade County.

6. Title to said lands described in the Commissioner's Deed of June 20, 1972, to Aerojet is hereby confirmed.

[913] 7. This Court retains jurisdiction of the action styled above and numbered Tallahassee Civil Action 1831 and of all of the parties to Tallahassee Civil Action 1831 and their successors in office or interest, to protect and effectuate this judgment and order.

7. This Court retains jurisdiction of the action styled above and numbered Tallahassee Civil Action 1831 and of all of the parties to Tallahassee Civil Action 1831 and their successors in office or interest, to protect and effectuate this judgment and order.

8. The preliminary injunction heretofore entered by this Court on March 8, 1973, nunc pro tunc as of October 31, 1972, in Case No. 1831 be and it is hereby vacated and dissolved.

APPENDIX E

APPENDIX E

STATE of Florida ex rel. METROPOLITAN DADE COUNTY, a political subdivision of the State of Florida,

Petitioner,

v.

Reubin O'Donovan ASKEW, Governor of the State of Florida, et al.,

Respondents.

No. 42461,
Supreme Court of Florida,
Oct. 11, 1972.

Original proceeding on mandamus petition by county against governor and other state officials alleging that the county had statutory right of first refusal to disputed tract of land and seeking to compel Trustees [828] of Internal Improvement Fund to offer the land to the county prior to any conveyance to lessee under lease agreement containing option to purchase. The Supreme Court, McCain, J., held that where the lease agreement gave lessee an option to purchase the leased land but expressly made methods by which the option could be exercised subject to applicable statutory rights and reservations in effect on date of conveyance or contract to purchase, subsequently enacted statute, providing that the Trustees should not

sell or convey land to which they hold title unless they shall afford an opportunity to county in which such land is situated to receive it for public purposes, was required to be complied with before transaction could be completed.

Writ issued.

Public Lands — 147½

Where lease agreement, between Trustees of Internal Improvement Fund and State Board of Education as lessors and corporation as lessee, gave lessee an option to purchase leased land but expressly made methods by which the option could be exercised subject to applicable statutory rights and reservations in effect on date of conveyance or contract to purchase, subsequently enected statute, providing that the Trustees should not sell or convey land to which they hold title unless they shall afford an opportunity to county in which such land is situated to receive it for public purposes, was required to be complied with before transaction could be completed.

F.S.A. § 253.111.

Stuart Simon, Dade County Atty. and Alan T. Dimond, Asst. Dade County Atty., for petitioner.

STATE EX REL. METROPOLITAN DADE COUNTY v ASKEW

Robert L. Shevin, Atty. Gen., Barry S. Richard, Deputy Atty. Gen., and M. Stephen Turner, Tallahassee, for respondents.

George W. Wright, Jr. and Karl B. Block, Jr., of Mershon, Sawyer, Johnston, Dunwody & Cole, Miami, for third-party respondent.

McCAIN, Justice.

This is an original proceeding in mandamus. An alternative writ was issued and a return has been filed.

In 1961, Aerojet-General Corporation, as lessee, entered into a 10-year lease agreement for a tract of land in Dade County. Lessors were the Trustees of the Internal Improvement Fund and The Board of Education of the State of Florida. The agreement gave Aerojet an option to purchase the land from the lessors at any time within the 10-year period. In 1969 Aerojet attempted to exercise its option to purchase the specific land. The Trustees, however, refused to convey, asserting that the lease-option agreement had been conditioned upon continued use by Aerojet of the manufacturing plant located on the land. It appeared that the plant in question had become inactive in 1967.

Aerojet thereupon sued in the U. S. District Court for the Northern District of Florida for specific perform-

ance of the provisions of the contract. That court determined that Aerojet had performed all conditions precedent to the exercise of the option cause, and ordered specific performance. Aerojet-General Corporation v. Kirk, 318 F.Supp. 55 (N.D.Fla., 1970). The decision of the District Court was affirmed on appeal: Aerojet-General Corporation v. Askew, 453 F.2d 819 (5th Cir. 1971). Because these opinions do not touch upon the contentions raised in the present mandamus proceeding, we do not discuss them in detail here.

Metropolitan Dade County now petitions for writ of mandamus here alleging that it has statutory right of first refusal to the [829] disputed tract of land, and seeking to compel the Trustees to offer the land to the County prior to any conveyance to Aerojet. Dade County argues that the Trustees are bound by Fla.Stat. § 253.111, F.S.A., enacted in 1965, which provides, in pertinent part:

"The board of trustees of the internal improvement trust fund of the state shall not sell or convey any land to which they hold title unless and until they shall afford an opportunity to the county in which such land is situated to receive such land for public purposes . . ."

It is urged that Fla.Stat. § 253.111, F.S.A. is inapplicable to the present transaction because the contract between Aerojet and the Trustees was entered into some four years prior to enactment of the statutory provision. We agree that if the problem were purely one of statutory constructions, this argument would be entitled to serious

consideration. However, our study of the contract itself leads us to conclude that the parties intended that subsequently enacted statutes be taken into consideration. We view the following language from the option clause (Section 8(a) and (b)) as critical:

"8. The Lessor herewith grants to the Lessee the exclusive right, option and privilege to purchase all of the land described herein at any time within the ten (10) year lease period . . . . In the event the Lessee exercises its right, option and privilege . . . the purchase price of said land . . . shall be payable as follows:

"(a) Upon the election of Lessee, the total amount of the purchase price . . . shall be paid to Lessor simultaneously with delivery to Lessee of a deed to said lands vesting good and merchantable fee simple title thereto in Lessee subject only to applicable statutory rights and reservations in effect on date of conveyance . . ., or

"(b) Upon election of Lessee, the payment of any amount equal to or in excess of twenty per cent (20%) of the total purchase price . . . shall be paid to Lessor simultaneously with the execution of a contract to purchase by and between the parties hereto, which contract to purchase shall provide for a promissory note for an amount equal to the unpaid balance due to Lessor from Lessee for purchase price of said lands . . . . Upon payment to Lessor by Lessee of the promissory note representing the balance

due on contract to purchase, the Lessor agrees to deliver to said Lessee a fee simple deed to said lands vesting good and merchantable fee simple title in Lessee, subject only to the applicable statutory rights and reservations in effect on date of the contract to purchase . . . ." (Emphasis supplied.)

Since both methods by which the option may be exercised are expressly made subject to applicable statutory rights and reservations in effect on date of conveyance or contract to purchase, we are of the view that Fla.Stat. § 253.111, F.S.A., which is presently in effect, must be complied with before the parties may complete their transaction.

Accordingly, the writ of mandamus heretofore sought by Dade County is issued and the Board of Trustees of the Internal Improvement Fund is ordered to offer the land to Dade County for purchase in accord with the provisions of Fla.Stat. § 253.111, F.S.A. Let the peremptory writ issue.

It is so ordered.

ROBERTS, C. J., and CARLTON, ADKINS and BOYD, JJ., concur.

APPENDIX F

[819]

APPENDIX F

AEROJET-GENERAL CORPORATION
Plaintiff-Appellee,

v.

Reubin O'Donovan ASKEW, Governor of
the State of Florida, et al.,
Defendants-Appellants.

No. 31018.
United States Court of Appeals,
Fifth Circuit.
Dec. 9, 1971.

Rehearing and Rehearing En Banc
Feb. 2, 1972

Action by private corporation for specific performance of option to purchase land which had been leased from Florida State Board of Trustees of the Internal Improvement Trust Fund and the Florida State Board of Education. The United States District Court for the Northern District of Florida, David L. Middlebrooks, Jr., J., 318 F.Supp. 55, granted summary judgment for plaintiffs and ordered specific performance, and defendants appealed. The Court of Appeals, Simpson, Circuit Judge, held that since title to land was vested in the Board of Education, the suit did not constitute an action against the state and, thus, was not barred by the Eleventh Amendment. The Court further held that where lessee had fulfilled its

promise to construct manufacturing plant and associated facilities on land, which lessee had option to purchase, and in so doing to utilize land in conjunction with option of such plant, lessee's discontinuance of solid fuel development operations when federal government cut back spending on such research did not constitute failure of consideration and, thus, did not disqalify lessee, which lessor had not notified of any breach or sent 60-day cure notice, from exercising option to purchase.

Affirmed.

1. Courts — 303(1)

Florida State Board of Trustees of the Internal Improvement Trust Fund and the Florida State Board of Education, sued by Ohio corporation for specific performance of option to purchase land, which corporation had leased from the Boards, did not waive right to claim immunity from suit under the Eleventh Amendment to the Federal Constitution by defending on the merits in the federal district court. U.S.C.A.Const. Amend. 11.

2. Courts — 303(1)

Two-step test for existence of Eleventh Amendment immunity from suit in federal court are: (1) whether the action is against the state, and (2) if the action is against the state, whether the state consented to be sued. U.S.C.A. Const. Amend 11.

3. Courts — 359

In determining whether an action is against the state for purpose of determining Eleventh Amendment immunity from suit in federal court, the federal court is to look to the law of the appropriate state for guidance. U.S.C.A. Const. Amend. 11.

4. Courts — 303(2)

Action by Ohio corporation against Florida State Board of Trustees for the Internal Improvement Fund and the Florida State Board of Education seeking specific performance of option to purchase land, which corporation had leased from the Boards, did not constitute an action against the state of Florida and therefore was not barred by the Eleventh Amendment to the United States Constitution, since, under Florida law, title to state school lands is in the State Board of Education. F.S.A. § 229.061-(6); U.S.C.A.Const. Amend. 11.

5. Landlord and Tenant — 92(4)

Where lessee had fulfilled its promise to construct manufacturing plant and associated facilities on land, which lessee had option to purchase, and in so doing to utilize land in conjunction with operation of such plant, lessee's discontinuance of solid fuel development operations when federal government cut back spending on such research did not constitute [820] failure of consideration and, thus, did not disqualify lessee, which lessor had not

notified of any breach or sent 60-day cure notice, from exercising option to purchase.

6. Specific Performance — 100

It was not abuse of discretion to grant equitable relief of specific performance without holding an evidentiary hearing, on ground that increase in value between date of lease and exercise of option to purchase raised issue of inadequacy of consideration, where lessors presented no reason to characterize option purchase price of $50 an acre as unreasonable or inequitable at time lease was executed.

7. Public Lands — 147½

As officials of the state of Florida, the State Board of Education and Board of Trustees of Internal Improvement Trust Fund, sued for specific performance of option clause giving lessee of property owned by Board of Education the option to purchase property, were limited to activities that were within their statutory authority.

8. States — 89

Predecessors in office of Florida State Board of Education and Board of Trustees of Internal Improvement Trust Fund did not exceed their warrants by executing lease, which served as basis for lawsuit against their successors for specific performance of option to purchase

clause exercisable ten years following commencement of lease.

9. States — 89

Claimed inadequacy of published notice of bids for lease, with option to purchase, of public lands, in that that portion requiring lessee to construct manufacturing facilities was fatally indefinite, would not permit Florida State Board of Trustees of the Internal Improvement Trust Fund and Florida State Board of Education, sued for specific performance of purchase option, to escape performance because of claimed inadequacy of notice, which had been published by officials' predecessors, in absence of allegation of any fraud, favoritism, collusion or corruption between option holder, which had made required payments in good faith for ten years and had dispatched required notice of election necessary to exercise its option, and officials' predecessors.

Robert L. Shevin, Atty. Gen., Fla., Ronald W. Sabo, Asst. Atty. Gen., Philip S. Bennett, Gen. Counsel, State Bd. of Trustees of the Internal Improvement Trust Fund, Stephen Marc Slepin, Counsel, State Bd. of Ed., Riv[illegible] Buford, Jr., Gen. Counsel State Bd. of Ed., Tallahass[illegible], Fla., Marion E. Sibley, Sp. Asst. Atty. Gen., Miami Beach, Fla., for defendants-appellants.

George W. Wright, Jr., Karl B. Block, Jr., Miami, Fla., for plaintiff-appellee.

Before GODBOLD, SIMPSON and CLARK, Circuit Judges.

SIMPSON, Circuit Judge:

The Aerojet-General Corporation (plaintiff), an Ohio corporation doing business in the State of Florida, brought suit in the district court against the State Board of Trustees of the Internal Improvement Trust Fund and the State Board of Education (defendants),[1] seeking specific performance of an option to purchase approximately 25,313 acres of land in Dade County, Florida. The defendants entered a general appearance and interposed several affirmative defenses. The district court granted a summary judgment in favor of the plaintiff and ordered the defendants to convey to the plaintiff the specified real estate. Aerojet-General Corporation v. Kirk, 1970, N.D.Fla., 318 F.Supp. 55. [821] Timely appeal to this Court followed. We affirm the district court.

[1]The following officials of the State of Florida compose the State Board of Education as well as the separate Board of Trustees of the Internal Improvement Trust Fund: Governor, Secretary of State, Attorney-General, Comptroller, Treasurer, Commissioner of Agriculture, and Commissioner of Education. Fla. Stat., Secs. 229.012 and 253.02(1), F.S.A.

In September and October, 1961, the defendants' predecessors in office caused to be published in the Homestead News, a newspaper of general circulation in Dade County, Florida, a Notice of Bids and Public Sale[2] by

[2]The text of the Notice was:

"NOTICE
BIDS TO BE RECEIVED
PUBLIC SALE

In pursuance of authorizations by the State Board of Education of Florida and Trustees of the Internal Improvement Fund of the State of Florida, respectively, competitive bids will be received at 10:00 A.M. (E.S.T.), on OCTOBER 24, A.D., 1961, in the Board Room of the Governor's Office in the State Capitol Building, Tallahassee, Florida for a ten-year lease with option to purchase, subject to provisions set forth herein, all of the following described lands in Dade County, Florida, to-wit:

Description	Twp. S.	Rge. E.	Acreage	Owner
Sections 1 through 14	56	37	8960	Tr. I. I. Fund
Sections 15 and 16	56	37	1280	Bd. of Ed.
Sections 17 through 20	56	37	2560	Tr. I. I. Fund
Sections 21 through 23	56	37	1920	Bd. of Ed.
Sections 24 through 36	56	37	8320	Tr. I. I. Fund
Section 16	57	37	640	Br. of Ed.
W ½ of Section 5	59	38	328	Tr. I. I. Fund
Section 6	59	38	665	Tr. I. I. Fund
Section 16	59	38	640	Bd. of Ed.

Total acreage including estimated area of unsurveyed sections - - - 25,313 acres.

which ten-year lease with option to purchase, if awarded, will require lessee-optionee to make payment of rental annually in advance during the lease term at the rate per acre at which award is made, also to make payment during the lease term to appropriate public agencies of an annual sum equal to any and all ad valorem taxes which would be due and payable if all of said lands and improvements thereon were owned in fee simple by such lessee-optionee. Under the lease-option lessee-optionee may during its ten-year consummate purchase of all of said lands at the price bid and upon which award is made by full payment

means of which bids [822] were solicited for the lease of lands owned by the defendants in Dade County, Florida.

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of total purchase price for deed, or by execution of purchase contract whereunder 20% of total purchase price shall be payable in cash on execution of contract, with balance in ten equal consecutive annual installments with interest on unpaid balance at 5% per annum. Neither the lease-option nor purchase contract will be subject to assignment without formal approval of both the Board of Education and said Trustees. Instrument of conveyance will contain all applicable statutory rights and reservations in effect on its date. Lessee-optionee will be required by covenant to commence, within a reasonable period of time, construction and installation of a manufacturing plant and associated facilities on said land or upon lands contiguous thereto and owned, leased or controlled by lessee-optionee, and to utilize above described land for operation of its manufacturing plant and associated facilities, and shall not, during the full period of ten years from date of the lease-option use any of said land for land speculation purposes without formal approval of both of the two said State Boards.

Bids must specify offer for both (1) annual lease rental per acre and (2) price per acre for option to purchase.

Bids for lease-options of less than the entire acreage above described will not be eligible for consideration.

Mailed bids must be directed to the State Land Office, Room 114, The Capitol, Tallahassee, Florida, and each mailed bid accompanied by certified or cashier's check in amount equal to the annual rental as bid for the entire acreage, payable to "Board of Education and Trustees of Internal Improvement Fund." Bidders may attach brief statement of nature of their intended operations for use of said lands. A purpose of this offering is to motivate establishment of facilities and production in the interest of the economy of Florida and National defense.

Oral competitive bidding for lease-option of the entire acreage (public auction) is scheduled to commence at the time and place stated first above, following the opening and reading of all mailed bids. The highest mailed bid, in compliance with the requirements herein, will become the starting offer for oral bidding from the floor. Bidders present may raise their written or oral offers. Highest bidder will be required to sign memorandum evidencing such bid and submit certified or cashier's check in amount not less than annual rental for one year for the entire acreage within 24 hours after award is made.

The right to reject any and all bids is reserved. Checks submitted

On December 21, 1961, the plaintiff and the defendants' predecessors in office entered into a written lease with option to purchase the leased lands at $50.00 per acre.[3]

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by unsuccessful bidders will be promptly returned after consideration of the bids. In the event of award and upon execution of the lease-option the check tendered by the successful bidder will be credited as paid rental for the period of time covered by such amount.

In the event an award is made and development and use for said purpose shall not be commenced within twelve months after date of lease-option, the said lease-option will then become subject to cancellation at the discretion of the two State owner-boards.

The above described lands include unsurveyed sections and estimated acreage and lessee-optionee will have the right by field survey made at the expense of lessee-optionee and by a Registered Land Surveyor or Certified Public Land Surveyor, approved by the two State Boards to establish a more accurate total acreage. In such event subsequent rentals or purchase payments shall be adjusted in accordance with the corrected total acreage.

BY ORDERS of the State Board of Education and Trustees of the Internal Improvement Fund."

[3]This instrument entitled "Lease with Option to Purchase" recites that it was made December 21, 1961, "by and between the State of Florida, by and through the Trustees of the Internal Improvement Fund of the State of Florida, and the State Board of Education of Florida, component state agencies of the State of Florida, with offices located in Tallahassee, Leon County, Florida, and Aerojet General Corporation, a corporation organized and existing under the laws of the State of Ohio, with principal place of business in Azusa, Los Angeles County, California". It recites in a series of "Whereas" clauses (a) that the two state agencies are vested with title to certain lands in Dade County, Florida, and are charged with the administration, management, control, supervision, conservation and protection of those lands; and (b) that said agencies have been advised by Aerojet-General Corporation that it has a need for a large tract of land consisting in part of these State lands for the purpose of establishing a manufacturing plant and associated facilities to be used in production activities designed to strengthen the defense posture of the United States, and (c) that since the best interests of the people of Florida will be served by said State lands being devoted to such usage, the said agencies have in compliance with statutory requirements of

Note 3 — Continued
Florida taken such action as was necessary to permit the use of the State lands as aforesaid, and (d) all statutory requirements have been satisfied and all necessary action taken, the said component state agencies of the State of Florida are authorized and empowered to enter into this agreement and authorize its execution.

It was then recited that it was mutually understood and agreed that in consideration of the sum of $10.00 paid by each party to the other, and in further consideration of the mutual covenants of the respective parties, that it was agreed between the component state agencies of the State of Florida thereinafter referred to as "Lessor" and Aerojet-General Corporation, thereinafter referred to as "Lessee", as follows:

1. That the Lessor leases the following described land, situate in Dade County, Florida, the ownership of said land being indicated opposite the description: (Here followed the description by section, township and range of the 25,313 acres of land involved, with ownership of some parcels attributed to "Trustees, I.I.F.", and some portions attributed to "Board of Education"), to have and to hold for a period of ten years from date thereof upon the following terms and conditions, part of which we will paraphrase and part of which, indicated by quotation marks, we will quote verbatim:

2. This paragraph contained the Lessee's agreement to pay an amount equal to the sum of $2.50 per acre during the lease unless the lease was sooner terminated [823] or cancelled as provided for therein, in advance, the first payment to be on execution of the agreement with subsequent payments on each anniversary date thereafter.

3. "The Lessee herewith agrees and covenants to commence within twelve (12) months after the execution hereof, the construction and installation of a manufacturing plant and associated facilities on said land or upon lands contiguous thereto owned, leased or controlled by Lessee and in so doing to utilize the aforementioned described land in conjunction with the operation of such manufacturing plant and associated facilities."

4. "The Lessor shall have the right to cancel this lease upon breach or failure of Lessee to comply with any of the covenants herein agreed to be kept or performed by Lessee. However, in the event of such breach or failure on the part of Lessee, Lessor shall give Lessee sixty (60) days notice, in writing, of its intention to cancel this lease and thereupon, unless such breach or failure be cured by Lessee within said sixty (60) day period, this lease and the terms hereof shall expire and come to an end on the date fixed in such notice as if the said date were the date originally fixed in this lease for the expiration thereof.

Note 3 — Continued
"It is mutually understood and agreed that this lease shall terminate if option to purchase said lands hereinafter granted by Lessor to Lessee is exercised by Lessee and that in such event no covenant herein made on the part of Lessee shall extend beyond such termination of this lease excepting the covenant of Lessee contained in paragraph 5 next below."

5. "The Lessee agrees and herewith covenants that the land herein leased and for which an option to purchase is herein granted shall not be used by Lessee for purposes of land speculation in any manner whatsoever for a period of ten (10) years next following the execution of this Agreement without written approval of Lessor first had and obtained."

6. This paragraph provided that improvements of every kind and nature placed on the lands during the term of the lease should be, in all legal intendment, as between parties, considered the personal property of the Lessee and provided for their removal by the Lessee upon the expiration or cancellation of the lease, or in the alternative for their abandonment by the Lessee, in which latter event the title was to pass to Lessor.

7. This paragraph provided for the payment annually by the Lessee to the proper public agencies a sum of money equal to and considered as in lieu of ad valorem taxes which would be payable on the lands if title thereto were owned in fee by the Lessee, and further to pay any valid special assessment levied on said lands. These payments were to continue through the lease period or until purchase of the lands by the Lessee as provided in the lease. Procedure for compliance with these provisions was made the responsibility of the Lessee in cooperation with local government agencies.

8. "The Lessor herewith grants to the Lessee the exclusive right, option and privilege to purchase all of the land described herein at any time within the ten (10) year lease period at and for a price of Fifty Dollars ($50.00) per acre. In the event the Lessee exercises its right, option and privilege to purchase the above described land, the purchase price of said land to be determined by the number of acres multiplied by Fifty Dollars ($50.00), less the amount of any unearned rent paid by Lessee under the terms of this lease shall be payable as follows:

(a) Upon the election of Lessee, the total amount of the purchase price to be determined, as aforesaid, shall be paid to Lessor simultaneously with delivery to Lessee of a deed to said lands vesting good and merchantable fee simple title thereto in Lessee subject only to applicable statutory rights and reservations in effect on date of

Note 3 — Continued
conveyance and the covenant on the part of Lessee to be kept and performed contained in paragraph 5 above, or

(b) Upon election of Lessee, the Payment of any amount equal to or in excess of twenty per cent (20%) of the total purchase price to be determined, as aforesaid, shall be paid to Lessor simultaneously with the execution of a contract to purchase by and between the parties hereto, which contract to purchase shall provide for a promissory note for an amount equal to the unpaid balance due to Lessor from Lessee for purchase price of said lands described herein, which note shall be paid to Lessor by Lessee in ten (10) equal and consecutive annual installments together with interest on the unpaid balance thereof at the rate of five per cent (5%) per annum. Lessee shall have the express right and privilege to pay up to and including the entire unpaid balance of any promissory note representative of the unpaid balance of the purchase price at any time after the execution thereof, without penalty. Upon payment to Lessor by Lessee of the promissory note representing the balance due on contract to purchase, the Lessor agrees to deliver to said Lessee a fee simple deed to said lands vesting good and merchantable fee simple title in Lessee, subject only to the applicable statutory rights and reservations in effect on date of the contract to purchase and the covenant of Lessee contained in paragraph 5 above."

9. This paragraph required the written approval of the Lessor for assignment of the lease by the Lessee.

10. This paragraph contained the usual Lessee covenant to hold the Lessor harmless from liability resulting from the Lessee's operations "under the terms of this lease prior to exercise of option herein granted to purchase the land herein described".

11. This paragraph obligated the Lessee to grant easements and rights of entry upon the land to the Central and Southern Florida Flood Control District, or its successor, as needed or required to make or construct canals, cuts, sluiceways, dikes and other such works.

The instrument was concluded with the usual formal signature clause.

An amendment to paragraph three of the lease [824] was executed by the parties on January 14, 1963.[4]

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[4]This instrument read as follows:

"AMENDMENT TO PARAGRAPH THREE OF LEASE WITH OPTION TO PURCHASE

"WHEREAS, on December 21, 1961, the Trustees of the Internal Improvement Fund of the State of Florida and the State Board of Education of Florida, as Lessor, entered into a Lease with Option to Purchase with Aerojet-General Corporation, as Lessee, for certain land situate in Dade County, Florida, and comprising approximately 25,313 acres, and

WHEREAS, Lessee, in Paragraph Three of the Lease with Option to Purchase above referred to, agrees and covenants to commence construction and installation of a manufacturing plant and associated facilities on the lands described in the Agreement or upon lands contiguous thereto, owned, leased or controlled by Lessee, within twelve months from the date of execution of said Lease with Option to Purchase, and

WHEREAS, prior to December 21, 1962, Lessee expended considerable funds in order to commence the actual building construction and installation of such facilities including extensive grading and foundation work; however, in order to eliminate any question as to whether Paragraph Three has been complied with, Lessee has heretofore submitted formal request to Lessor for modification of Paragraph Three of the instrument of Lease with Option to Purchase so as to grant an additional period of time of two years within which to commence construction and installation of a manufacturing plant as provided in this paragraph, and

WHEREAS, the Trustees of the Internal Improvement Fund and the State Board of Education of Florida did consider this request at the meetings of said agencies held on October 9, 1962, and did determine and agree that it would best serve the interests of all parties to the Agreement as well as the public interest to approve this request for additional time.

NOW, THEREFORE, that for and in consideration of the sum of TEN DOLLARS ($10.00) paid by each party hereto to the other, receipt of which the parties each and severally acknowledge, and in further consideration of the mutual covenants of the respective parties hereto, it is hereby agreed by and between the Trustees of the Internal Improvement Fund of the State of Florida and the State Board of

In addition to leasing the subject land from defendants, the plaintiff purchased additional land surrounding the defendants' lands, at an expenditure of $7,100,000. In early 1962, plaintiff began construction of a plant for the development of solid rocket fuels, which resulted in a capital investment on the plaintiff's part for buildings and equipment of $21,200,000. About $2,000,000 of this construction was located on the land leased from the Board of Education and the Board of Trustees of the Internal Improvement Trust Fund. The plant was completed in the spring of 1964 and was in operation until June, 1967, at which

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Education of Florida, component state agencies of the State of Florida, referred to in the above mentioned Lease with Option to Purchase as 'Lessor', and Aerojet-General Corporation, referred to in same as 'Lessee', as follows:

1. That Paragraph Three of said Lease with Option to Purchase dated December 21, 1961, by and between the parties hereto, be and the same hereby is amended in its entirety to read as follows:

'3. The Lessee herewith agrees and covenants to commence prior to December 21, 1964, the construction and installation of a manufacturing plant and associated facilities on said land or upon lands contiguous thereto owned, leased or controlled by Lessee and in so doing to utilize the aforementioned described land in conjunction with the operation of such manufacturing plant as associated facilities.'

2. That, except as provided in Paragraph One above, all of the terms, covenants and conditions of said Lease with Option to Purchase dated December 21, 1961, shall remain the same.

IN WITNESS WHEREOF, the Trustees of the Internal Improvement Fund and the State Board of Education, hereinabove and in said Lease with Option to Purchase referred to as Lessor, have hereunto set their hands and affixed their respective seals and the seal of the Commissioner of Agriculture of the State of Florida and Aerojet-General Corporation, hereinabove and in said Lease with Option to Purchase referred to as Lessee, has caused its name to be signed by its duly authorized officers and attested by its Secretary and affixed its corporate seal in triplicate, this 14th day of January, 1963."

time it ceased operations due to cutbacks in the federal government's spending on solid rocket fuel research and development. Since that time the plaintiff has maintained a caretaker force of fourteen people at the plant.

On September 8, 1969, the plaintiff notified each of the defendants in writing[5] that it had elected to exercise its option to purchase the lands which are the subject of the lease. Prior to that date, the plaintiff had paid over $500,000 in yearly rentals under the lease to the defendants

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[5]The letter to the State Board of Education was as follows:

"State Board of Education
Capitol Building
Tallahassee, Florida
Attention: Mr. Floyd T. Christian
Commissioner of Education
Reference: Lease with Option to Purchase dated December 21, 1961, between Trustees of the Internal Improvement Fund of the State of Florida and the State Board of Education of Florida, as Lessors, and Aerojet-General Corporation, as Lessee

Gentlemen:

Aerojet-General Corporation has elected to exercise its option to purchase the lands which are the subject of the above lease.

We are enclosing herewith a copy of this Notice of Exercise of Option to Purchase, the original of which has been forwarded to the State of Florida, Board of Trustees of the Internal Improvement Fund.

We would appreciate your advice as to the procedure you wish to follow in the closing of this transaction.

Very truly yours
AEROJET-GENERAL CORPORATION
E. E. Nelson
Plant Manager".

The letter to the Board of Trustees of the Internal Improvement Fund was identical except for the addressee and its being directed to the attention of Mr. James T. Williams, Chief State Land Office.

and $231,000 under Paragraph 7 of the lease to Dade County in lieu of ad valorem taxes. Payments under the lease were current in all respects. At no time prior to the "notify date", September 8, 1969, had the defendants or their predecessors in office ever notified plaintiff or even intimated to it that plaintiff had failed in any way whatever to comply with the terms of the lease. No objection was made prior to that time to the reduction in work force caused by the shutdown in operations of June, 1967. At a meeting of the State Board of Education and of the Board of Trustees of the Internal Improvement Trust Fund on October 21, 1969, it was decided not to convey the land to the plaintiff. This suit to compel conveyance of the property was instituted that same day.

The complaint for specific performance recited the terms of the lease and the plaintiff's attempt to exercise its option to purchase. It asserted that the plaintiff was ready, willing, and able to pay the required amount of the purchase price simultaneously with the execution of a contract to purchase between the plaintiff and the defendants, but that [826] the "defendants have advised the plaintiff that they will not accept said required amount of the purchase price and will not execute, and have failed and refused to execute, said contract to purchase".

On December 1, 1969, the defendants filed their answer in the court below in which they admitted the allegations of the complaint[6] and interposed several affirmative defenses. The answer asserted that plaintiff had breached the contract by shutting down its operations in June, 1967, thereby rendering it ineligible to purchase the property under the terms of the option clause. Additionally, the defendants suggested that the remedy of specific performance was inappropriate because the value of the land involved had appreciated considerably between the time the lease was executed and the time that the plaintiff gave its notice of election to exercise the option to purchase. On September 21, 1970, the district court granted the plaintiff's motion for summary judgment and directed the defendants to execute and comply with a contract of sale of the real property once the plaintiff had made the prescribed payments.

On January 15, 1971, the defendants filed their appellate brief with this Court in which they urged the reversal of the grant of summary judgment in favor of the plaintiff on the following grounds: (1) the plaintiff was in default under the terms of the lease at the time it sought to exercise the option to purchase because of the plant shutdown, and in dispute.

[6]The answer to the complaint as well as to Requests for Admissions asserted that defendants were without knowledge of the allegations of plaintiff's being an Ohio corporation with its principal place of business in a state other than Florida. This was covered by affidavit in connection with the Motion for Summary Judgment and is not

was therefore disqualified from exercising the option; and (2) the district court should not have granted summary judgment as to the remedy of specific performance because the appreciation in the value of the land raised a material issue of fact which necessitated a trial on the merits. In response, the plaintiff argued that the lease clearly empowered the lessee to exercise its option at any time within the lease period and that the defendants, prior to their refusal to convey the land, had at no time given the required sixty day notice of default to the plaintiff. Aerojet of course took the position that the district court's grant of summary judgment was proper.

The State of Florida underwent a change of administration on January 5, 1971. The successor defendants, after a review of the record in this case, petitioned this Court for leave to file a supplemental brief. Leave was granted and oral argument postponed. On April 14, 1971, the defendants filed a supplemental brief in which they repudiated two concessions which their predecessors had made in the course of the proceedings in the district court: (1) that the defendants had authority under the laws of the State of Florida to grant to the plaintiff a ten-year option to purchase over twenty-five thousand acres of land at fifty dollars an acre; and (2) that the notice published in the Homestead News was sufficient to comply with the requirements of applicable Florida law.[7] In reply to the

[7]The district court noted:

"It is conceded by the defendants that the Trustees and the Board of Education have complete authority and discretion to convey

supplemental brief of the defendants, Aerojet filed a brief in which it argued that: (1) the law of Florida empowered the defendants to dispose of the lands held by them by means of lease, sale, or option; (2) the notice published in the Homestead News complied with all the pertinent provisions of [827] the Florida statutes; and (3) the defendants were estopped to deny the validity of the option clause in the lease.

At oral argument, this Court, on its own motion, raised the question of whether this suit was barred by the provisions of the Eleventh Amendment to the United States Constitution.[8] In response to the Court's request, the parties submitted additional briefs on this point, Aerojet arguing that the suit is not barred by the Eleventh Amendment and the defendants taking the contrary position.

and dispose of lands held by them in such manner as in their judgment may be most advantageous. * * * Defendants have likewise conceded that the notice provisions contained in Chapter 270, Florida Statutes, F.S.A., were followed; and there is no bar to plaintiff's claim arising out of the requirements of those statutes." 318 F.Supp. at 61.

[8]"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

I.

Waiver of Eleventh Amendment Immunity by General Appearance

Even if this suit was initially barred by Eleventh Amendment immunity, such immunity may have been waived by general appearance and defense on the merits in the trial court. We approach the waiver question first.

In Clark v. Barnard, 1883, 108 U.S. 436, 2 S.Ct. 878, 27 L.Ed. 780, the assignees of a bankrupt railroad and the treasurer of the State of Rhode Island contested ownership of a $100,000 certificate of indebtedness issued by the City of Boston. The assignees brought suit in federal court and named the State Treasurer, Samuel Clark, as a defendant. Clark demurred to the complaint on the basis that the Eleventh Amendment to the United States Constitution barred the suit. The demurrer was overruled. An interlocutory decree was subsequently entered ordering the City of Boston to pay into the registry of the court the face amount of the certificate and authorizing the State of Rhode Island to file a claim for damages for breach of a surety bond given by the officers of the railroad prior to its bankruptcy. The money was paid in and the State filed its claim. After judgment was entered for the assignees, Clark and the State appealed, raising the jurisdictional bar of the Eleventh Amendment. The Supreme Court rejected this argument saying:

"We are relieved, however, from its consideration by the voluntary appearance of the state in intervening as a claimant of the fund in court. The immunity from suit belonging to a state, which is respected and protected by the constitution within the limits of the judicial power of the United States, is a personal privilege which it may waive at pleasure; so that in a suit, otherwise well brought, in which a state had sufficient interest to entitle it to become a party defendant, its appearance in a court of the United States would be a voluntary submission to its jurisdiction, while, of course, those courts are always open to it as a suitor in controversies between it and citizens of other states. In the present case the state of Rhode Island appeared in the cause and presented and prosecuted a claim to the fund in controversy, and thereby made itself a party to the litigation to the full extent required for its complete determination. It became an actor as well as defendant, as by its intervention the proceeding became one in the nature of an interpleader, in which it became necessary to adjudicate the adverse rights of the state and the appellees to the fund, to which both claimed title. The case differs from that of Georgia v. Jesup, 106 U.S. (458), 462 (1 S.Ct. 363, 27 L.Ed. 216), where the state expressly declined to become a party to the suit, and appeared only to protest against the exercise of jurisdiction by the court. The circumstance that the appearance of the state was entered without prejudice to the demurrer of Clark, the general treasurer, does not affect the result. For that demurrer could not reach beyond the question of [828] the right to sue Clark by reason of his official character, which became

insignificant when the state made itself a party; and in point of fact the bill was framed to avoid the objection, by charging Clark as a wrong-doer in his individual capacity." 108 U.S. at 447-448, 2 S.Ct. at 883-884, 27 L.Ed. at 784-785.

Were this the Supreme Court's final statement on the subject of the waiver of a state's Eleventh Amendment immunity by means of a general appearance in federal court, we would have no difficulty in finding such a waiver in this case. The waiver by general appearance doctrine was severely undermined, if not discarded, however, as a result of the Supreme Court's decision in Ford Motor Company v. Department of Treasury of the State of Indiana, 1949, 323 U.S. 459, 65 S.Ct. 347, 89 L.Ed. 389.

The Ford Motor Company brought suit in federal court against the department of the treasury of the State of Indiana and the board of that department, consisting of the governor, treasurer and auditor, pursuant to Section 64-2614(a) of the Indiana statutes, seeking a refund of gross receipts taxes. The Indiana officials defended on the merits of the taxpayer's claim and were successful in the district court and in the court of appeals. The Supreme Court vacated the judgments of the lower courts and remanded the case with instructions to dismiss the complaint for want of the consent of the State of Indiana to suit. Without referring to its holding in Clark v. Barnard, supra, the Supreme Court disposed of the taxpayer's waiver of immunity by general appearance contention as follows:

"It remains to be considered whether the attorney general for the State of Indiana in his conduct of the present proceeding has waived the state's immunity from suit. The state attorney general is authorized to represent the state in actions brought under the Indiana refund statute. He appeared in the federal District Court and the Circuit Court of Appeals and defended the suit on the merits. The objection to petitioner's suit as a violation of the Eleventh Amendment was first made and argued by Indiana in this Court. This was in time, however. The Eleventh Amendment declares a policy and sets forth an explicit limitation on federal judicial power of such compelling force that this Court will consider the issue arising under this Amendment in this case even though urged for the first time in this Court." 323 U.S. at 466-467, 65 S.Ct. at 351-352, 89 L.Ed. at 395-396.

(1) Following the holding in Ford Motor Company, we are of the opinion that the defendants did not waive the right to claim immunity from suit under the Eleventh Amendment to the Constitution by defending on the merits in the district court.[9]

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[9]In so ruling, we are not unmindful of the citation of Clark v. Barnard in Mr. Justice Douglas's opinion for the Court in Petty v. Tennessee-Missouri Bridge Commission, 1959, 359 U.S. 275, 276, 79 S.Ct. 785, 787, 3 L.Ed.2d 804, 807, for the proposition that immunity can be waived by general appearance. See, also, MacDonald v. Board of Regents of the University of Michigan, 6 Cir. 1967, 371 F.2d 818.

II.
The Existence of Eleventh
Amendment Immunity

(2, 3) Mr. Justice Reed, speaking for the Court in Ford Motor Company, supra, laid down a two-step test for the existence of an Eleventh Amendment immunity from suit in federal court: (1) whether the action is against the state, and (2) if the action is against the state, whether the state consented to be sued in the federal courts. 323 U.S. at 462, 65 S.Ct. at 349, 89 L.Ed. at 393. The Court indicated that, in answering the first inquiry, a federal court was to look to the law of the appropriate state for guidance. 323 U.S. at 463, 65 S.Ct. [829] at 350, 89 L.Ed. at 394. Our analysis of Florida laws leads us to the conclusion that the first question should be answered in the negative. In view of this ruling, we did not reach the second step of the test.

Section 229.012, Florida Statutes, F.S.A., provides that the state board of education shall consist of the governor, the secretary of state, the attorney general, the comptroller, the treasurer, the commissioner of agriculture, and the commissioner of education. Pursuant to Section 229.053(2) (f), Florida Statutes, F.S.A., the board of education is instructed "to have possession of and manage all lands granted to or held by the state for educational purposes". This board's powers over state educational land are further elaborated in Section 229.061(6), Florida Statutes, F.S.A.:

"It shall be the responsibility of the state board to exercise all powers and perform all duties prescribed below: To obtain possession of, to hold title to, and take general charge, oversight, and management of all lands granted to or held by the state for educational purposes; to fix the terms of sale and policies relating to rental or use of such lands, and to adopt whatever policies may be necessary to preserve them from trespass or injury and to provide for their improvement."

Pursuant to Section 253.01, Florida Statutes, F.S.A., certain lands and the proceeds of the sale of such lands are set apart and declared a separate and distinct fund, called the Internal Improvement Trust Fund of the State. Section 253.02(1), Florida Statutes, F.S.A., enumerates the powers of the Board of Trustees of the Fund:

"For the purpose of assuring the proper application of the internal improvement trust fund for the purposes of this chapter, the land provided for in §§ 253.01 and 253.03, and all the funds arising from the sale thereof, after paying the necessary expense of selection, management and sale, are irrevocably vested in a board of seven trustees, to wit: The governor, the secretary of state, the attorney general, the comptroller, the state treasurer, the commissioner of education, the commissioner of agriculture and their successors in office, to hold the same in trust for the uses and purposes provided in this chapter, with the power to sell and transfer said lands to the purchasers and receive payment for the same, and invest the surplus moneys arising therefrom, from time to time, in stocks of the United

States, stocks of the several states, or the internal improvement bonds issued under the provisions of law; also, the surplus interest accruing from such investments. Such board of trustees have all the rights, powers, property, claims, remedies, actions, suits and things whatsoever belonging to them, or appertaining before and at the time of the enactment hereof, and they shall remain subject to and pay, fulfill, perform and discharge all debts, duties and obligations of their trust, existing at the time of the enactment hereof or provided in this chapter".

In Hampton v. State Board of Education, 1925, 90 Fla. 88, 105 So. 323, suit was brought against the State Board of Educ. tion and its members to compel specific performance of a contract to sell school lands. The trial court sustained the defendants' demurrer to the complaint on the basis that the suit was in actuality one against the state to which the state had not consented. On appeal, the Supreme Court of Florida affirmed.

At the time the contract to purchase in Hampton was executed, the Florida Statutes provided:

"The state board of education are directed and empowered:

"First. To obtain possession of and take charge, oversight and management of all lands granted to or held by the state for educational purposes, and to fix the terms of sale, rental or use of such lands, and to do whatever may be necessary to preserve them from trespass or injury, and

for their improvement". Sections 601, 602, par. 1, Rev. Gen.Stats.1920.

[830] In affffirming the order of the lower court, the Florida Supreme Court declared:

"The appellees are state officers and the subject-matter of the suit is state property. The title to the property is not in the state officers. They merely have statutory authority to sell the property.

"This suit directly involves the property of the state. The state is the real party in interest, though the suit is nominally against state officers in their official capacity as state officials. . . . If the contract sued on is valid, it is the contract of the state". 90 Fla. at 97-98, 105 So. at 326. (Emphasis supplied)

We believe that Chapter 19355, Florida Laws, 1939, which amended what is now Section 229.061(6), Florida Statutes, F.S.A., remedied the defect which caused the Florida Supreme Court in Hampton to characterize that suit as one against the state. The statute as now written specifically vests title to state school lands in the State Board of Education.

As further support for our view, we refer to another portion of the Hampton opinion, in which the Court compared the powers of the State Board of Education with those of the trustees of the Internal Improvement Trust Fund:

"By chapter 610, Laws of Florida, approved January 6, 1855 (sections 1055 et seq., Revised General Statutes 1920), superseding chapter 332, Laws of Florida, approved January 24, 1851, the 500,000 acres of internal improvement lands granted to the state by Act of Congress of March 3, 1845, and the swamp and overflowed lands received by the state under the Act of Congress of September 28, 1850 (U.S. Comp.St. §§ 4958-4960), were 'irrevocably vested in five trustees' who are state officers 'and their successors in office, to hold the same in trust for the uses and purposes' stated in the act, 'with the power to sell' the lands and with directions for executing the trusts for which the lands were "irrevocably vested' in the trustees. Under such statutory provisions, suits against the trustee state officers, with reference to the execution of the trust including sales of the lands and the use of the proceeds for the trust, are not suits against the state. See Trustees I. I. Fund v. Bailey, 10 Fla. 112, text page 132, 81 Am.Dec. 194. In such cases the suits are to require the due performance of duties prescribed by statute.

"By sections 602, 603, and 3798, Revised General Statutes 1920, the state retains the title to all state school lands and merely authorizes the state board of education to take possession of, to manage, to preserve, and to fix the terms of sale, and to convey the title to 'all lands granted to or held by the state for educational purposes.' Under these statutes the title remains in the state and the state officers have no title, but a mere power of agency to sell the lands, not for trust purposes of an administrative

nature, but such sales are for 'the principal of the state school fund' which 'shall remain sacred and inviolate.' Sections 4 and 5, art. 12, Constitution. In view of these organic and statutory provisions, a suit brought against the state officers to enforce a contract for the sale of state school land is in effect in a suit against the state, since it relates to land the title to which is in the state for the benefit of a 'sacred and inviolate' school fund, and the state has not by statute directed the contract to be made, and has not by law authorized a suit against the state." 90 Fla. at 100-101, 105 So. at 327.

As noted above, Section 229.061(6), Florida Statutes, F.S.A., presently vests title to Board of Education land in the Board and not the State of Florida.

(4) We hold that this suit does not constitute an action against the State of Florida and is, therefore, not barred by the Eleventh Amendment to the United States Constitution, as to either of the two state boards in question.

[831]

III.

Discharge by Failure of Consideration

(5) In the district court and here, the defendants have argued that the plaintiff, by discontinuing solid fuel development operations at its Dade County facilities, in

June, 1967, disqualified itself from exercising its option to purchase the land pursuant to the option clause of the lease. In other words, the cessation of development activities, according to the defendants, constituted "failure of consideration". Our analysis of the lease leads us to reject the "failure of consideration" theory advanced by the defendants.

Professor Corbin, in his treatise on the law of Contracts, has this to say about the doctrine of failure of consideration:

"In the case of a promise that is not entirely independent, the promisor may be discharged by his failure to receive the agreed equivalent for which his promised performance was to be exchanged. This is true, even though the other party has not promised in return to perform this agreed equivalent. The promisor's duty to render his performance may be either expressly or impliedly conditional upon the giving of something recognized by the parties as the agreed equivalent of that which he himself promises to do, even though there is no promise by anybody in return. In such a case, if the promisor has not received and is not going to receive the agreed equivalent of his own performance, he will not be required to perform at all. There is a failure of consideration, even though there is no breach of contract. In most cases, doubtless when the parties have agreed upon an equivalent to be exchanged for a promised performance, the contract is put into a bilateral form, with a return promise to render the agreed

equivalent. In such a case failure of consideration may also be a breach of contract; and the discharge could be called a discharge by breach, as well as a discharge by failure of consideration. The failure to render a promised performance may not be a breach of contract for the reason that performance has become impossible without fault; but it is nonetheless a failure of consideration discharging the other party from his duty to make the agreed return and giving him a right to the restitution of payments already made or other benefits already conferred". Corbin on Contracts, Section 1255, Volume 6, page 21.

Under the terms of the lease, the plaintiff agreed to pay an annual rental in amount equal to $2.50 per acre, to pay to local taxing authorities amounts equal to the ad valorem taxes which would ordinarily be assessed against the property, and to grant necessary easements and rights of way to the South Florida Flood Control District. The promise which constitutes a critical aspect of this case reads as follows:

"3. The lessee herewith agrees and covenants to commence within twelve (12) months after the execution hereof, the construction and installation of a manufacturing plant and associated facilities on said land or upon lands contiguous thereto owned, leased or controlled by lessee and in so doing to utilize the aforementioned described land in conjunction with the operation of such manufacturing plant and associated facilities".

This paragraph was amended by the parties on January 14, 1963, to permit the plaintiff to commence construction of the plant no later than December 21, 1964.

The plaintiff did construct the manufacturing facilities as contemplated by the lease. When the federal government reduced its spending on solid rocket fuels, however, the plaintiff terminated its operations at the Dade County location. Once the plaintiff completed construction of the agreed-upon facilities, the defendants received all they had bargained for. The lease did not expressly or impliedly require the plaintiff to engage in solid rocket fuel development operations [832] throughout the life of the lease as a prerequisite to the plaintiff's exercise of its option to purchase. Even if the lease and option to purchase are to be treated as inseparable aspects of one transaction, we are of the opinion that the defendants may not avoid performance on a failure of consideration theory.

Our resolution of the failure of consideration issue is buttressed by the fact that the defendants at no time prior to the attempted exercise of the option to purchase in September, 1969, gave the plaintiff the required sixty-day cure notice stipulated by the fourth paragraph of the lease. Between the time that the plaintiff curtailed its operations in June, 1967, and the time that the plaintiff attempted to exercise its option to purchase, the defendants had ample opportunity ot determine that a breach had taken place and to dispatch the sixty-day cure notice. Accordingly, we concur with the district court in holding that no failure of consideration took place in June, 1967.

IV.
The Grant of Specific Performance
on Summary Judgment

(6) The defendants urge that it was an abuse of discretion for the district court to grant the equitable relief of specific performance without holding an evidentiary hearing. In this regard, the defendants allude to the fact that the value of the land in question probably increased in value between 1961 and 1969, thereby raising the issue of inadequacy of consideration. Our examination of the matters presented to the district court by the defendants in opposition to the plaintiff's motion for summary judgment leads us to conclude that the court below committed no abuse of discretion in summarily granting specific performance to the plaintiff.

We note as a preliminary that specific performance may be granted on a motion for summary judgment in appropriate cases. Professor Moore observes:

"The basis principles governing the grant or denial of summary judgment in other types of actions apply, of course, in actions for the reformation or rescission of a contract; or for specific performance, for damages, or for specific performance or in the alternative for damages of all types of contracts". Moore's Federal Practice, Section 56.17(11), page 2507.

Professor Corbin's discussion of options contains the following passages:

"An option to buy or sell is frequently given as part of a larger contract with other purposes; and a consideration sufficient to make the option binding and irrevocable may be found in the consideration that the optionee gives in that larger contract. Thus, suppose a lease of land in which the lessee is given an option to buy at a stated price conditional on notice before termination of the lease. The promise to pay rent is the consideration both for the lessor's covenants as lessor and for his promise to sell; it is sufficient to make all the promises enforceable that are given in return for it, and the option is not revocable". Corbin on Contracts, Section 266, Volume 1A, pages 539-540.

"It has been thought that equity would not decree the specific performance of an option contract for any one of several reasons. These reasons are not sound and the remedy is available in spite of them; but they require some discussion. These reasons are absence of consideration, inadequacy of consideration, and lack of mutuality because the holder of the option is not bound to perform."

"First, suppose that A promises under seal to sell Blackacre to B for $5,000, if B gives notice of acceptance within 30 days. Secondly, suppose that the foregoing promise of A is in consideration of one dollar actually paid. These cases may be discussed together. In the first case, there is no consideration for A's promise, and in the second the consideration is a small [833] amount. The courts of equity did not require adequacy of consideration, as measured by the general market, as a prerequisite to

specific enforcement; but they frequently did say that specific enforcement would be denied if the consideration was so grossly inadequate as to shock the chancellor's conscience and lead to the conclusion that there had been fraud or unfair dealing. Accepting this doctrine at its face value, it does not prevent specific enforcement of either of the option contracts supposed above. The purpose of the doctrine is to prevent fraud and unfair dealing and to prevent one person from acquiring the property of another for nothing or for a shockingly inadequate return. In the present cases, there is no unfair dealing and the option contract does not purport to require A to convey Blackacre for nothing or for one dollar. The agreed price is $5,000; and unless that is shown to be shockingly inadequate, the chancellor's conscience will be quite at ease. The decree compelling A to convey will be made conditional on B's payment of $5,000 into court; or, if the option agreement provided for deferred payment, conditional upon giving sufficient security". Corbin on Contracts, Section 269, Volume 1A, pages 557-558.

In discussing contracts for the sale of land, Professor Corbin states:

"The purchaser's remedy in damages for breach of contract to transfer land or an interest therein is practically never regarded as so complete and adequate as to preclude specific enforcement". Corbin on Contracts, Section 1143, Volume 5A, page 126.

The Florida jurisprudence is in harmony with the above-quoted excerpts from the Corbin treatise. In Charbonier v. Arbona, 1912, 63 Fla. 384, 57 So. 887, the Supreme Court of Florida held that equity will specifically enforce a contract for the sale of land when the price is a fair one when the contract was made and no advantage has been taken of the defendant. In Charbonier, the defendant, in March, 1910, for a consideration of $100 in cash, gave the plaintiffs an option to buy the defendant's land for $5,000 within six months. The option was exercised before the end of the six month period and specific performance was decreed even though the value of the property had substantially increased.

In Bigman v. University Federal Savings and Loan Association, 1965, Fla. App.3rd, 170 So.2d 330, 331, the Court noted:

"The optionee (for consideration) during the term of his option has a right that the option given shall not repudiate nor make performance impossible or more difficult, and said right is enforceable by all the usual judicial remedies including judgment for damages, injunction and decree for specific performance.

Paragraph 8 of the lease gave the plaintiff the option to purchase all the land described in the instrument "at any time within the ten (10) year lease period at and for a price of Fifty Dollars ($50.00) per acre". The defendants presented to the district court no reason to characterize the option purchase price as unreasonable or inequitable

at the time the lease was executed. We find no reason to suppose that the defendants' predecessors were so inexperienced or uninformed in 1961 that the present defendants should be insulated from a decree of specific performance.

V.
Defendants' Authority to Grant the Option

(7, 8) On this appeal, the defendants argue that their predecessors in office were without power in 1961 to grant the plaintiff an option to purchase exercisable within the ten year term of the lease. The thrust of this argument is that the pertinent Florida statutes do not specifically empower the State Board of Education or the Board of Trustees of the Internal Improvement Trust Fund to include an option to purchase real property within a lease. Defendants [834] in this connection cite no Florida decisions but refer us to rulings of courts in Texas, Georgia, and Mississippi.[10]

Plaintiff, in contending that the predecessors of the defendants had sufficient authority in 1961 to grant an option to purchase within the ten year lease period, points

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[10]Potter County v. C. C. Slaughter Cattle Co., 1923, Tex. Civ.App., 254 S.W. 775; Adler v. Adler, 1961, 216 Ga. 553, 118 S.E.2d 456; American Oil Company v. Marion County, Miss. 1939, 187 Miss. 148, 192 So. 296.

to the absence of Florida decisions on this point and to the long established practice on the part of the State Board of Education and the Internal Improvement Trust Fund of including renewal options in leases. It also urges that the statutory powers granted the State Board of Education and the Internal Improvement Trust Fund are sufficiently broad to encompass the power to grant an option to purchase within a lease instrument, as well as to sell.

Defendants' argument on this point is not persuasive. As officials of the State of Florida, the defendants are of course limited to activities that are within their statutory authority, but we believe that the predecessors of the defendants did not, in 1961, exceed their warrants by executing the lease which serves as the basis for this lawsuit.

We recognize the obligation of the defendants to safeguard an asset of the State of Florida—land—which is in increasingly short supply. The defendants nevertheless clearly have a duty to deal fairly with those with whom they have contracted. As a matter both of statutory construction and of good faith and fair dealing, we conclude that the defendants should not prevail on the issue of authority to grant an option to purchase the land covered by the lease.

VI.
The Sufficiency of the Notice

The defendants argue on this appeal that the notice published in the Homestead News in September and October, 1961, did not conform to the Florida competitive bidding statutes, Sections 270.07, 270.08 and 270.09, Florida Statutes, F.S.A.,[11] in that the portions dealing [835]

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[11] "270.07 Certain public lands not to be sold without advertisement

No lands in the state that are now, or may hereafter be, vested in the board of trustees of the internal improvement trust fund of the state, or the state board of education, shall be sold, conveyed or disposed of by the said board of trustees or by the said board of education until notice by publication shall have been given for the full term of thirty (30) days prior to such sale; provided, that this section shall not apply to homestead, railroad or canal grants, as now provided for by law nor to any conveyance pursuant to the provisions of § 253.111.

"270.08 Notice of sale of public lands by advertisement

When the board of trustees of the internal improvement trust fund, or the state board of education shall decide or regard it expedient to sell any of the lands that are now, or may hereafter be, vested in the board of trustees of the internal improvement trust fund of the state, or in the state board of education, they shall give thirty (30) days' notice of such sale, by publication in some newspaper published in the county or counties where such lands to be sold are situated, and also, such other papers as may be deemed advisable, once each week; which said notice shall contain a description of the lands, state the terms of sale, the time and place where such lands shall be sold, and notify the people that they will receive bids therefor at Tallahassee, from the time of giving such notice until the day of sale. In case said board of trustees is making the sale, they shall require the persons publishing said notice to file with it immediately after the expiration of the time of such sale, proof of said publication, which shall, at all times, be subject to inspection by any person desiring to see same. And in case the said state board of education is proceeding to make such sale, it shall likewise require such persons publishing

with the construction of manufacturing facilities were fatally indefinite. In arguing that these portions rendered it impossible for the appropriate public officials to make exact comparisons of the bids, defendants-appellants assert in their brief:

"In order for the bidders to be on a parity and in order for comparisons to be made as to which bid would

said notice to file with it, immediately after the expiration of the time of said sale, proof of said publication, which shall at all times be subject to inspection by any person desiring to see same. None of the provisions of this section shall limit the applicability of § 253.111. "270.09 Bids to purchase public lands; sale to highest bidder; proviso, etc.

After the notice referred to in § 270.07 shall have been issued, any person shall have the privilege of filing with the trustees of the internal improvement trust fund, if they be making the sale, or with the state board of education, if it be making the sale, a bid or written proposition to purchase said lands; and same shall not be opened until the day of sale provided in said notice, at which time all bids shall be opened in the presence of the said trustees, if they be making the sale, or in the presence of the state board of education, if it be making the sale, at the office of the said trustees or the board of education making the sale, as the case may be, in Tallahassee, at which time any person so desiring may be present. And the said trustees, if they be making the sale, or the said state board of education, if it be making the sale, shall sell to the highest bidder, upon satisfactory terms, for cash or otherwise, as they may determine, the lands advertised as prescribed in § 270.07, and shall make, execute and deliver a deed or deeds to the purchaser or purchasers of such lands, in the manner now provided by law and in accordance with the terms agreed upon.

A record of all such sales and proceedings shall be kept by the said trustees, if they be making the sale, or by the said state board of education, if it be making the sale, which shall at all times be subject to inspection by any and all persons; provided, that all bids may be rejected if the price offered is not satisfactory to those making the sale; and provided further, that §§ 270.06-270.08 and this section shall not apply where the quantity of land sought to be sold does not exceed a half section of land."

be the highest and best and in order for the bidder to understand the nature and character of the obligation he is required to assume, it was essential and necessary that the notice contain a complete and detailed description of the proposed manufacturing plant and associated facilities to be installed and constructed. No one could possibly ascertain from this notice the size, cost or purpose of 'a manufacturing plant and associated facilities' from anything that was contained in said notice. It was within the power of the trustees to include a covenant, if one bidder was successful, which might require a manufacturing plant and associated facilities costing hundreds of millions of dollars, but, if another and favored bidder was the highest, the board could insert a covenant requiring the installation and construction of a manufacturing plant and associated facilities costing only a few thousand dollars. Nothing could be plainer than that this was a notice for bids aimed to assure Aerojet it would get the property. This flies directly in the teeth of the competitive bidding statute and renders the option to purchase invalid and unforceable." (Appellants' supplemental brief, page 23)

(9) We regard it as significant that, despite appellants' intimation that the claimed ambiguity of the notice for bids was designed to assure the plaintiff that it would get the property, they fail to allege any fraud, favoritism, collusion, or corruption between Aerojet and the defendants' predecessors in office. In the absence of such allegations, Florida jurisprudence will not permit the defendants to escape performance because of the claimed inadequacy of the notice for bids.

In the leading case of Wester v. Belote, 1931, 103 Fla. 976, 138 So. 721, the Florida Supreme Court refused to enjoin Duval County from paying a vendor of [836] merchandise. In so doing, the Court rejected the contention of the taxpayer-plaintiff that the invitation for bids was defective in that it was not reasonably definite. After stating that contracts awarded in a manner which did not comply with the competitive bidding statutes were to be considered null and void, the Court cautioned:

"But it by no means follows that a competitively awarded contract must in every instance be set aside, and payments under it enjoined, at the suit of a citizen and taxpayer, because of insufficient specifications embraced in the advertisement for bids, where what has been done by the board appears to have been done as a result of a bona fide effort on the county commissioners' part to comply with the statute, and no actual fraud, misconduct, favoritism, prejudice, or discrimination is charged with reference to the transaction as completed." 103 Fla. at 987-988, 138 So. at 726. (Emphasis supplied)

Although the Wester case involved the complaint of a taxpayer against the payment by a county board to a vendor under a public advertisement to bid whereas we deal here with the refusal of successor trustees to convey real property to Aerojet, a successful bidder for that right, we nevertheless find the above quoted excerpt from the Wester opinion of compelling application to this case. At this late date, after the plaintiff has in good faith made the required payments and dispatched the required notices

of election necessary to exercise its option to purchase, we hold that Aerojet is entitled to prevail in the absence of specific charges of "actual fraud, misconduct, favoritism, prejudice, or discrimination". Wester, supra.

For the reasons we have outlined, the judgment and decree of the district court are

Affirmed.

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

PER CURIAM:

The Petition for Rehearing is denied and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is denied.

APPENDIX G

APPENDIX G

AEROJET-GENERAL CORPORATION
an Ohio corporation, Plaintiff,

v.

Claude R. KIRK, Jr., Governor, et al.,
Defendants.
Civ. A. No. 1534.

United States District Court,
N. D. Florida,
Tallahassee Division.
Sept. 21, 1970.

Action by private corporation for specific performance of purchase option granted to it in lease of Florida public lands, vested in trustees of internal improvement trust fund and State Board of Education. On motions of lessee-corporation for summary judgment and of the state agencies to dismiss, the District Court, Middlebrooks, J., held, inter alia, that, though lease provided for construction of manufacturing plant by lessee-corporation, cessation of operations of the manufacturing plant did not constitute failure of consideration, precluding exercise of the option, where lessee had paid the specified annual rental and amounts in lieu of ad valorem taxes, and had exercised the option, becoming obligated to pay the purchase price, before the state agencies asserted the alleged failure.

Summary judgment granted; motion to dismiss denied.

1. Public Lands — 147½

Lease-option with respect to Florida public lands, vested in the trustees of the internal improvement trust fund and in the State Board of Education, fairly and properly reflected and contained the terms and provisions enumerated in the published notice, despite minor variations inuring to the benefit of the state agencies or providing contractual formula to effect condition of notice with respect to termination. F.S.A. §§ 270.07-270.09.

2. Public Lands — 147½

Where lease of Florida public lands, vested in trustees of internal improvement trust fund and in state board of education, to private corporation for construction of manufacturing plant, with option to purchase, was amended to grant lessee corporation additional time for construction and installation of the plant, republication by the state agencies was not required. F.S.A. §§ 270.07-270.09.

3. States — 84

Florida state agencies enjoy no privileged status affecting their contractual rights and liabilities, and the same legal rules and principles apply to and govern the rights of such agencies and the rights of private persons under a contract.

4. Contracts — 57

Mutually enforceable promises may constitute valid consideration for each other.

5. Public Lands — 147½

Lease of Florida public lands to private corporation with option to purchase, which provided for payment by corporation of annual rental, payments in lieu of taxes and, upon exercise of option, purchase price, together with construction of manufacturing plant by corporation, was supported by legal consideration.

6. Public Lands — 147½

Under lease of Florida public lands, vested in trustees of internal improvement trust fund and in State Board of [56] Education, to private corporation for construction of manufacturing plant, with option to purchase, cessation of operations of the manufacturing plant did not constitute failure of consideration precluding exercise of option, where lessee-corporation had paid each year when due the annual rental and payments in lieu of ad valorem taxes, and where lessee had become obligated to pay the purchase price by exercise of the option prior to assertion of the alleged failure.

7. Vendor and Purchaser — 18(1)

"Option contract" is not contract of sale but is uni-

lateral contract which gives option holder the right to purchase under the terms and conditions of the option agreement.

See publication Words and Phrases for other judicial constructions and definitions.

8. Public Lands — 147½

Under lease of Florida public lands, vested in trustees of internal improvement trust fund and State Board of Education, to private corporation for construction of manufacturing plant, with option to purchase, which provided that lease should terminate upon exercise of the option that no covenant therein should extend beyond such termination except covenant not to use the land for speculative purposes, and which provided for giving of notice by the state agencies of any alleged breach, cessation of operations of manufacturing plant, which the state agencies did not assert as breach prior to exercise of option, did not constitute breach of condition precedent to exercise of option.

9. Public Lands — 147½

Under lease of Florida public lands, vested in trustees of internal improvement trust fund and State Board of Education, to private corporation, with option to purchase, which provided that upon exercise of option the lease should terminate and that no covenant therein (with one exception) should extend beyond such termination, and

which provided for notice of any alleged default, the state agencies could not, under theory that time is the essence or otherwise, after exercise of the option to purchase, validly avoid the option by then asserting for the first time prior alleged breach of a covenant of the lease.

10. Vendor and Purchaser — 18(3)

Time is of the essence of option contract in that the term of the option limits the optionee's right to exercise.

11. Vendor and Purchaser — 18(3)

Where one holds option based on valid consideration to purchase real estate and desires to exercise the option, he must definitely accept the proposition by notifying the vendor of such decision within the time specified, and on the terms named.

12. Vendor and Purchaser — 18(3)

When option to buy land is definitely accepted, it ceases to be an option and ripens into mutually binding and enforceable contract, the terms of which are identical to those contained in the option.

13. Specific Performance — 97(1)

Under lease of real estate with option to purchase, which provided that not less than 20% of the purchase price became due and payable upon execution of contract

to purchase, after exercise of option, it was not necessary that optionee tender actual payment of that sum in order to bring action for specific performance, and it sufficed that optionee advised vendor and the court that it was ready, willing and able to perform its contractual obligations.

14. Specific Performance — 57

Under lease of Florida public lands to private corporation for construction of manufacturing plant, with option to purchase, defense of failure of inducement was insufficient in action by corporation for specific performance of the option agreement, when corporation exercised the option after having paid agreed rentals and payments in lieu of taxes, but after the manufacturing plant had suspended operations.

15. Contracts — 108(1)

Contract is not void as against public policy unless it is injurious to the interests [57] of the public or contravenes some established interest of society, and thus contracts are not void as contrary to public policy unless they are either agreements to effect some unlawful or socially repugnant end, or agreements to effect some lawful end by unlawful or socially repugnant means.

16. Public Lands — 147½

Lease of 25,313 acres of Florida public lands at annual rental of $2.50 per acre, together with amount in lieu

of ad valorem taxes, to private corporation for construction of manufacturing plant, with option in corporation to purchase at price of $50 per acre, entered into by trustees of internal improvement trust fund and by State Board of Education pursuant to legislative authority, was not contrary to public policy. F.S.A. §§ 229.08, 253.02, 253.18, 270.01 et seq.

17. Specific Performance — 29(2), 30

Essential provisions of contract for sale of land, so that it may be specifically enforced, are that the property and the interest therein to be conveyed is definitely described, that the purchase price is definite and specific, and that the time and terms of payment of the purchase price are definite, and provision of alternate terms for payment of purchase price does not preclude specific enforcement.

18. Specific Performance — 28(2)

For purposes of specific performance of contract for sale of land, absolute certainty or definiteness is not required with respect to nonessential elements of the contract, and such may be reduced to certainty by legal rules and presumptions.

Karl B. Block, Jr., Mershon, Sawyer, Johnston, Dunwody & Cole, Miami, Fla., for plaintiff.

Phillip S. Bennett, Gen. Counsel, Board of Trustees of the Internal Improvement Trust Fund.

Rivers Buford, Jr., Gen. Counsel, State of Florida Board of Education, Tallahassee, Fla., for defendants.

SUMMARY FINAL JUDGMENT FOR PLAINTIFF AND ORDER ON MOTIONS

MIDDLEBROOKS, District Judge.

The above cause initially came on for hearing before the Court on February 18, 1970, upon plaintiff's Motion to Strike certain defenses contained in the Answer of the defendants, and defendants' Motion to Dismiss the Complaint, the latter motion having been filed by the defendants along with their Answer to the Complaint. Prior thereto memorandum briefs had been submitted by plaintiff and defendants in support of their respective motions. At the conclusion of said hearing, the Court requested counsel for plaintiff and defendants to submit additional memoranda of law, and reply memoranda of law upon certain questions the Court raised. Such additional memoranda and reply memoranda were filed and thoroughly considered by the Court. Further oral argument was held before the Court on August 28, 1970, upon the aforesaid motions. The Court having now considered all of said pending motions as well as the pleadings, affidavits, admissions and exhibits on file with the Court and the concessions made by counsel for defendants in oral argument

before the Court, is of the opinion and finds that there is no genuine issue of material fact to be tried in this cause and that the plaintiff is entitled to the entry of summary final judgment in its favor as a matter of law and grants the relief sought and prayed for by the plaintiff in its Complaint. The Court makes the following specific findings of undisputed material fact and conclusions of law:

FINDINGS OF UNDISPUTED MATERIAL FACT

(1) The plaintiff is and was at the time of filing of its Complaint herein a corporation duly incorporated, organized and existing under the laws of the State of Ohio, with its principal offices and place of business in a state other than [58] Florida. The defendants[1] are the present constituent members of the Board of Trustees of the Internal Improvement Trust Fund of the State of Florida (successors in office to the Trustees of the Internal Improvement Trust Fund of the State of Florida), and the State Board of Education of Florida, both component state agencies of the State of Florida. They are and were

[1]The defendants, members of the Board of Trustees of the Internal Improvement Trust Fund of the State of Florida and their predecessors in office will be hereinafter referred to as the "Trustees". The defendants, members of the State Board of Education of the State of Florida, will be hereinafter referred to as the "Board of Education".

at the time of the filing of plaintiff's complaint herein, citizens of the State of Florida and residents of Leon County, Florida. The matter in controversy herein exceeds the sum of $10,000.00, exclusive of interest and costs.

(2) On December 21, 1961, plaintiff and the Trustees and Board of Education of Florida executed and entered into a Lease With Option To Purchase (Exhibit A to the complaint—hereinafter referred to as "Lease-Option" or "contract"). The Lease-Option recited satisfaction of all statutory requirements, performance of all prerequisites to execution of the Lease-Option, and the authority of the Trustees and Board of Education to enter into and execute the Lease-Option. The Trustees and Board of Education by that instrument leased to plaintiff approximately 25,313 acres of specifically described real estate located in Dade County, Florida, for ten years. The defendants owned fee title to the land in their respective official capacities.

(3) Among the covenants of the plaintiff under the Lease-Option was its agreement: (i) to pay an annual rental in advance commencing on the date of execution of the Lease-Option and continuing on the anniversary date thereof each year thereafter in the sum of $2.50 per acre, (ii) to pay annually to the appropriate local governmental agencies a sum of money equal to, but in lieu of the amount of ad valorem real estate taxes which would be due and payable on the leased lands if title thereto were owned in fee by the plaintiff, together with any valid special assessments levied upon the property (hereinafter referred to as "in lieu taxes") which in lieu taxes would be paid during the lease period or until purchase of the property by plaintiff was effectuated under the option to purchase granted it therein, and (iii) to commence within twelve months after the date of execution of the Lease-Option construction and installation of a manufacturing plant and associated facilities upon the leased lands or upon lands contiguous thereto owned, leased or controlled by plaintiff and in so doing to utilize the leased lands in conjunction with the operation of such manufacturing plant and associated facilities.

(4) Under paragraph 8 of the Lease-Option, the Trustees and Board of Education granted to the plaintiff the exclusive right, option and privilege to purchase all of the lands described therein "at any time within the ten (10) year lease period" for a price of $50.00 per acre, the purchase price to be determined by the number of acres multiplied by $50.00, less the amount of any unearned rent paid by the plaintiff under the lease. No specific mode or manner of exercise of said option to purchase was specified in the Lease-Option. The option to purchase allowed plaintiff an election to pay the total amount of the purchase price simultaneously with delivery to it of a deed to the property vesting good and merchantable fee simple title thereto in the plaintiff, or to pay any amount up to or in excess of 20% of the total purchase price simultaneously with the execution of a "contract to purchase" between the parties. Under said contract to purchase, a promissory note would be given by plaintiff to defendants in the amount

of the unpaid balance, due and payable in ten equal, consecutive, annual installments [59] with interest on the unpaid balance at the rate of 5% per annum. Plaintiff was granted the right to pre-pay the unpaid balance without penalty at any time, in which event the Trustees and the Board of Education would deliver to plaintiff a deed to the subject lands vesting good and merchantable fee simple title thereto in the plaintiff. Neither the Lease-Option nor the Notice of Bids and Public Sale, pursuant to which the Lease-Option was executed, contained any condition precedent to the plaintiff's exercise of the option to purchase, save its exercise during the ten-year lease period and the payment by plaintiff of the purchase price. Specifically, the Lease-Option did not contain any term, covenant or condition that plaintiff not have breached, or not be in default in the performance of any lease covenant, or that the lease be in good standing as a condition to its exercise of the option to purchase.

(5) The Lease-Option specifically provided that, upon plaintiff's exercise of the purchase option, all covenants of the lease agreement would cease, except that contained in paragraph 5, prohibiting plaintiff, except with defendants' permission, from using the property for "purposes of land speculation in any manner whatsoever" for a period of ten years next following execution of the Lease-Option.

(6) The Lease-Option specifically granted the Trustees and Board of Education the "right to cancel" the lease upon breach of or failure of plaintiff to comply with any of the lease covenants; but only after the Trustees and

the Board of Education gave plaintiff sixty days prior written notice of their intention to cancel the lease for such breach of covenant, during which period plaintiff had the right to cure such alleged breach or failure to comply with any of the lease covenants.

(7) Prior to execution of the Lease-Option, to-wit: On September 21 and 28 and October 5, 12 and 19, 1961, a Notice of Bids and Public Sale (Exhibit 1 to plaintiff's Request for Admissions of Fact—hereinafter referred to as the "Notice") was duly published in the Homestead News, a newspaper of general circulation in Dade County, Florida, in its editions of those dates, in compliance with and as provided for in Sections 270.07-270.09, Florida Statutes, 1961, F.S.A., and a Proof of Publication thereof (Exhibit I to plaintiff's Request for Admissions of Fact) was duly executed by said newspaper and filed with the Trustees and Board of Education.

(1)(8) On the day and in the manner specified by said Notice, plaintiff submitted the high bid on the Lease-Option offering. The parties thereafter executed and entered into a written Lease-Option agreement, the terms of which were essentially identical to the terms enumerated in said public Notice. There were minor and insignificant differences in the Notice terms and in the Lease-Option terms. The Lease-Option reserved to defendants the right to cancel the Lease-Option upon sixty days' prior written notice for the alleged breach of "any" lease covenant. The Notice prescribed cancellation rights only in the event of breach of the covenant contained in paragraph 3 of the

Lease-Option. This modification of terms inured to defendants' benefit. Also, the Lease-Option contained a specific procedure to be utilized by defendants in the event they sought to terminate the contract for an alleged breach by plaintiff. A sixty-day notice of default, with opportunity to cure, was the contractual formula implemented to effect the condition in the Notice that under certain circumstances defendants could in their "discretion" terminate the Lease-Option.

Notwithstanding these minor variations, the Court finds that the terms of the Notice and of the Lease-Option were identical in substance, and that the contract here sought to be specifically enforced fairly and properly reflects and contains the terms and provisions enumerated in the Notice.

[60]

(9) On January 14, 1963, plaintiff and the Trustees and Board of Education entered into an Amendment to Paragraph Three of Lease With Option to Purchase (hereinafter referred to as "Amendment to Lease-Option"). The Amendment to Lease-Option acknowledged the expenditure by plaintiff of "considerable funds in order to commence the actual building construction and installation" of the manufacturing plant and associated facilities provided for by paragraph 3 of the Lease-Option, including extensive grading and foundation work, and further acknowledged, in essence, a "question" as to whether there

had been compliance with paragraph 3 of said Lease-Option. The Amendment to Lease-Option, "in order to eliminate" any such "question", and acknowledging "that it would best serve the interests of all parties to the Agreement as well as the public interests" to grant additional time to plaintiff for commencement of construction and installation of such manufacturing plant and associated facilities, amended paragraph 3 of the Lease-Option so as to provide for commencement of such construction and installation prior to December 21, 1964. All other terms and covenants of the Lease-Option were unaffected; and they remained in full force and effect.

(10) From and since December 21, 1961, (the date of execution of Lease-Option), plaintiff timely paid to the Trustees and Board of Education, who received and accepted from the plaintiff all annual rentals and in lieu taxes required to be paid by the plaintiff under the Lease-Option.

(11) Plaintiff on September 8, 1969, mailed to the Trustees and Board of Education, by certified mail, return receipt requested, a written notice bearing the same date to said parties that the plaintiff was thereby exercising its option to purchase all of the subject lands under and pursuant to the provisions of paragraph 8(b) of the Lease-Option, electing to pay, as provided for therein, 20% of the total purchase price, less any unearned rent from date of closing, in cash in exchange for the simultaneous execution of the contract to purchase provided for. The plaintiff ex-

pressly waived in said notice its right to have the actual acreage determined by a survey and elected to purchase the property as containing 25,313 acres, as permitted by the Lease-Option provisions. Plaintiff advised the Trustees and the Board of Education that it was and stood ready, willing and able to pay the required amount of the purchase price and to execute said contract to purchase simultaneously with the execution by the Trustees and the Board of Education of said contract to purchase. The written notice of the exercise of the option to purchase was received by the defendants (Trustees and Board of Education) on September 10, 1969. At no time prior to the receipt of said notice of exercise of the option to purchase by them, did defendants or any of them ever deny their authority to enter into and perform under the Lease-Option nor did defendants ever advise the plaintiff or give plaintiff any written notice of any alleged breach by the plaintiff of, or its alleged failure to comply with, any of the covenants contained in the Lease-Option. Neither the Trustees nor the Board of Education ever gave any notice of intention to cancel or of the actual cancellation of said Lease-Option during that time. Nevertheless both the Trustees and Board of Education thereafter advised plaintiff that they would neither accept the required amount of the purchase price nor execute the contract of purchase. Defendants have since failed and refused to do so. At a meeting conducted by the defendants on October 21, 1969 (over a month after plaintiff's exercise of its option to purchase the subject lands), defendants averred for the

first time that the plaintiff had not performed all of the lease covenants. Notwithstanding the express requirements as to method of termination of the Lease-Option above referred to, a majority of the defendants voted at that meeting to "void" the Lease-Option. Defendants [61] for the first time on October 21, 1969, advised plaintiff that an alleged breach of paragraph 3 of the Lease-Option existed, because plaintiff's manufacturing plant (dedicated to processing large solid fuel rockets under government contracts) had to become inactive in June of 1967, although the plant was continued to be maintained in a useful condition. (See Exhibit II, Plaintiff's Request for Admissions of Fact.) In sum, defendants were then, for the first time, informing plaintiff that it had lost its right to exercise its option to purchase by reason of an alleged breach of lease covenant prior to the exercise of its option to purchase.

CONCLUSIONS OF LAW

(1) The Court has jurisdiction of the cause and the parties. 28 U.S.C. § 1332. The Lease-Option was made and was to be performed in Florida; and it is undisputed that the Court must ascertain and apply the substantive law of Florida in this case, under the doctrine of Erie R. Co. v. Tompkins, 1938, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188.

(2) Procedurally, the case is before the Court on defendants' Motion to Dismiss Plaintiff's Complaint and

Plaintiff's Motion to Strike Affirmative Defenses and for Summary Final Judgment. The material facts have been stipulated to or admitted by defendants and the issues on both the motion to dismiss and motion for summary judgment are issues solely of law. The Court finds that plaintiff is entitled to summary final judgment; and so it is unnecessary to rule on Plaintiff's Motion to Strike.

(3) The Court has imposed on itself and counsel the duty to ascertain and apply to these facts the available case law on the issues herein, to the end that the interests and rights of the people of Florida and the parties litigant are properly protected. Though Florida case law is not abundant on the issues here presented, it is sufficient to guide this Court to its decision. Resort need not be had to foreign law, although it is equally corroborative of the Court's conclusions here.

(4) It is conceded by defendants that the Trustees and the Board of Education have complete authority and discretion to convey and dispose of lands held by them in such manner as in their judgment may be most advantageous. (See, Florida Statutes, §§ 253.18, 253.02, 229.08, 270.07 and 270.09, F.S.A.; Trustees of Internal Improvement v. Root, 1912, 63 Fla. 666, 58 So. 371; Everglades Sugar & Land Co. v. Bryan, 1921, 81 Fla. 75, 87 So. 68; Defendants' Reply Memorandum, p. 8.)

(2) (5) Defendants have likewise conceded that the notice provisions contained in Chapter 270, Florida Statutes, F.S.A., were followed; and there is no bar to plaintiff's claim arising out of the requirements of those statutes. That is, it is conceded that defendants had authority to lease the lands and grant an option to plaintiff to purchase them, that a lease with option to purchase of defendants' lands is a "disposition" of them within the meaning of F.S. § 270.07, F.S.A.; and that publication of the terms and conditions of the authority to accept bids for a Lease-Option of these lands was duly and regularly had, and plaintiff timely and properly made the high bid. It is further conceded and the Court concludes that the subsequent amendment to the time requirement in paragraph 3 of the Lease-Option did not require republication (see Defendants' Reply Memorandum, p. 8). There existed throughout a valid subsisting agreement granting to plaintiff an option to buy the property involved on fixed terms and prices, and the amendment in no way affected that agreement. The amendment was merely an exercise of discretion vested in defendants by the contract to alter the time requirements for performance of paragraph 3 of the lease. It was a written carification regarding the then status of performance of one aspect of one lease covenant, an aspect about the performance of which there admittedly existed [62] some "question" and which defendants chose not to litigate or otherwise pursue.

(6) With admirable candor, defendants have conceded that their defense is based upon their ascertion that the manufacturing plant and facilities built by plaintiff on lands here involved, or contiguous thereto, is at this time

not under full operation; but rather it is merely being maintained on an inactive status due to the current slowdown in solid fuel rocket development (see, Defendants' Reply Memorandum, p. 8).

(3) (7) When the State of Florida or one of its component agencies, enters into a contract with private persons, the same legal rules and principles apply to and govern the parties' rights under the contract. State agencies enjoy no privileged status affecting either their contractual rights or liabilities. Daniell v. Sherrill, Fla.1950, 48 So.2d 736; McCarty v. Booth, Fla.1954, 69 So.2d 655; Gay v. Southern Builders, Inc., Fla.1953, 66 So.2d 499. In construing this Lease-Option, therefore, the Court may look to Florida law on such contracts without regard to the public or private capacities of the parties involved.

(4, 5) (8) The contract of the parties is a "Lease with Option To Purchase," in which there was a mutual exchange of undertakings, promises and covenants, more detailed enumeration of which is unnecessary. It suffices to say that mutually enforceable promises may constitute valid consideration for each other, and that this contract was supported by legal consideration. Jones v. McCallum (Fla.1885), 21 Fla. 392; Chamberlain v. Lesley (Fla.1897), 39 Fla. 452, 22 So. 736,; Walters v. Miller (Fla.1915), 70 Fla. 432, 70 So. 629; Foreman v. First National Bank (Fla. 1918), 76 Fla. 48, 79 So. 742; Jenkins v. City Ice & Fuel Co. (Fla.1935), 118 Fla. 795, 160 So. 215; Texas Co. v. Pensacola Maritime Corp., 279 F. 19 (5th Cir. 1922); Miami

Coca-Cola Bottling v. Orange Crush Co., 296 F. 693 (5th Cir. 1924). The terms of the lease and the terms of the option were in some ways related, and in some ways independent of each other; but the exchange of mutually enforceable promises constituted consideration for both the lease and the option agreements. See, Sisco v. Rotenberg (Fla.1958), 104 So.2d 365; Cf. 32 American Jurisprudence, Landlord & Tenant, § 299.

(9) Defendants' principal defense is predicated on their contention which plaintiff must admit for purpose of the pending motions, that at the time plaintiff gave notice of exercise of the option its manufacturing plant and associated facilities were not in operation, but were merely being maintained by a 14-man maintenance staff. Defendants have characterized their legal defense as "failure of consideration", "failure to perform conditions precedent", and "time is the essence of an option contract". Whatever label the defense should take the Court must decide whether this asserted fact constitutes under any legal theory a defense to plaintiff's claim. The Court concludes as a matter of law that it does not.

(6) (10) The "failure of consideration" theory clearly does not apply in this case. In Jones v. McCallum (1885), 21 Fla. 392, the Florida Supreme Court decided under what circumstances a contract could be avoided due to failure of consideration. McCallum agreed with Jones to write editorials and lend counsel to Jones in a newspaper enterprise; and Jones agreed to pay McCallum $1,000.00.

McCallum died within days after the agreement and prior to performance of any services under the contract. His widow sought payment under a provision requiring payment to her in case McCallum died. The Florida Supreme Court held that recovery could be had if McCallum had performed any services under the contract; but since no services had been rendered prior to his death the consideration for the agreement had failed and the promise of Jones was discharged.

[63]

Applying that rule here it is clear that consideration has not failed. Plaintiff has paid rental each year when due and has paid "in lieu" ad valorem taxes. Plaintiff has further become obligated to pay the $1,265,000.00 purchase price. Consideration has not "failed" here. Moreover, its alleged failure was not asserted until long after plaintiff had exercised its option to purchase which terminated the lease and all of the covenants thereunder save only that against land speculation until December 21, 1971 (paragraph 5 of Lease-Option).

(11) The "condition precedent" argument is that the option to purchase was conditioned on there being no breach of any lease covenant at the time plaintiff gave notice of exercise of the option. Defendants argue that plaintiff's manufacturing facilities were not in operation when the option was exercised and therefore plaintiff was not entitled to exercise and is not entitled to purchase.

(7) An option contract is not a contract of sale. "(I)t is a unilateral contract which gives the option holder the right to purchase under the terms and conditions of the option agreement. South Inv. Corp. v. Norton (Fla.1952), 57 So.2d 1, 2. Thus, the Court must look to "the terms and conditions of the option agreement" to ascertain whether good standing under the lease is a condition of the option agreement.

(8, 9) The parties' agreement speaks for itself, and it makes very clear the relationship of option terms and lease covenants. The lease covenants are contained in paragraphs 1, 2, 3, 4, 5, 6, 7, 9, 10 and 11; and the option terms are contained in paragraphs 2, 4, 5 and 8. The agreement specifically provides in paragraph 4, that:

"It is mutually understood and agreed that this lease shall terminate if option to purchase said lands hereinafter granted by Lessor to Lessee is exercised by Lessee and in such event no convenant herein made on the part of Lessee shall extend beyond such termination of this lease excepting the covenant of Lessee contained in paragraph 5 next below."[2]

And in paragraph 8, the agreement is that:

"The Lessor herewith grants to the Lessee the exclusive right, option and privilege to purchase all of the land

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[2]All emphasis supplied unless otherwise indicated.

described herein at any time within the ten (10) year lease period at and for the price of Fifty Dollars ($50.00) per acre. * * *"

These two contract provisions explicitly define the nature of the option plaintiff received under this contract. Its terms are simple and they are independent of the lease covenants except as specified. Plaintiff had the option to purchase the lands during the lease term for a designated price upon terms designated in paragraph 8. If and when plaintiff exercised its option in the manner required by law the contract specifically provided that the "lease shall terminate" and that "no covenant herein made on the part of Lessee shall extend beyond such termination of this lease excepting the covenant" not to use the lands for speculative purposes within ten years after execution of the contract. Under this contract, paragraph 3 and all other lease covenants (save one) expire and are of no further effect when the option is exercised.

The contract (including both the "lease" terms and the "option" terms) provides no other conditions to the exercise of the option and the law implies none. Insofar as lease covenants are concerned the contract makes termination for default in performance or breach of lease covenants only an alternative which defendants may utilize in their discretion[3] if they conclude that [64] the lease is being

[3]This is the terminology used in the notice of authority to accept bids, which was reduced to a specific procedure in the contract.

breached. The contract requires specific action to be taken to declare default in any lease covenant and terminate the agreement, furthermore, and does not contain an automatic default or reverter provision. The contract rather requires that, in the event defendants desired to declare default or terminate the contract they were requird to give notice of such alleged breach and to give plaintiff sixty days in which to cure any default.

The record is undisputed that defendants have never given a sixty day notice of default; and they gave no notice of default of any kind from the commencement of the lease term through the time plaintiff exercised the purchase option. It would be inequitable to allow defendants to avoid now the contract when plaintiff had never been given opportunity to cure any default—an opportunity defendants were bound to afford to plaintiff before the Lease-Option could be terminated.

In sum, paragraph 3 and all other lease terms save one were covenants of the lease for breach of which defendants had power to terminate the Lease-Option; but they were not, either by bylaw or by contract, conditions of the option or conditions precedent to its exercise of the option to purchase, validly avoid the option by then asserting for the first time a prior alleged breach of a covenant of the lease wherein the option was granted. E. g., Gassert v. Anderson (1937) 201 Minn. 515, 276 N.W. 808; Keogh v. Peck (1925), 316 Ill. 318, 147 N.E. 266; Chapman Drug Co. v. Chapman (1960), 207 Tenn. 502, 341 S.W.2d

392; Padilla v. Sais (1966), 76 N.M. 247, 414 P.2d 223; Reynolds v. Earley (1955), 241 N.C. 521, 85 S.E.2d 904; Shannon v. Jacobson (1928), 262 Mass. 463, 160 N.E. 245; Cf., South Inv. Corp. v. Norton, supra. Accordingly, plaintiff had the right to exercise its option throughout the lease term unless and until defendants properly and in conformity with its terms, terminated the lease and the option to purchase therein granted, or, at least gave proper notice of default or breach.

(10) (12) Defendants have argued that "time is the essence of an option contract" in conjunction with their assertion that plaintiff has ceased operations at the manufacturing plant. The reasoning applicable to the "condition precedent" argument disposes of this theory. Time is admittedly the essence of an option in that the term of the option limits the optionee's right to exercise. Under the Lease-Option plaintiff's right to exercise the option survived for the lease term, which term ended after ten years or upon proper termination after declaration of default by defendants. Therefore, the undisputed fact that plaintiff exercised the option prior to any such declaration of default disposes of this theory.

(11, 12) (13) Where one holds an option based on a valid consideration to purchase real estate and desires to exercise the option to buy, he must definitely accept the proposition by notifying the vendor of such decision within the time specified on the terms named. Orlando Realty Board Building Corp. v. Hilpert (1927), 93 Fla. 954, 113 So. 100. When an option to buy lands is definitely accepted, it ceases to be an option and ripens into a mutually binding and enforceable contract, the terms of which are identical to those contained in the option. Ibid; Behrman v. Max (1931), 102 Fla. 1094, 137 So. 120. The Court concludes as a matter of law that the written notices of exercise dispatched by plaintiff to defendants on September 8, 1969, were timely and proper and constituted exercise by plaintiff of its option in accordance with the option terms contained in the contract. Accordingly, on September 10, 1969, (the date defendants received this notice), the option ripened into a mutually binding and enforceable contract for sale; and the landlord-tenant relationship between the parties ceased. Defendants attempted cancellation of the contract given thereafter [65] is and was null and void and of no force or effect.

(13) (14) The contract provides in paragraph 8(b) that the plaintiff's initial payment of not less than 20% of the purchae price becomes due and payable at such time as the parties execute a contract to purchase. It was not necessary that plaintiff tender actual payment of that sum in order to bring this action. Sisco v. Rotenberg, supra. It suffices that plaintiff advised defendants and the Court, as it did, that plaintiff was ready, willing and able to perform its contractual obligations. There has been no question raised of plaintiff's ability to perform.

(14) (15) In their Answer defendants asserted affirmatively the defense of "failure of inducement", which defense the Court concludes is insufficient as a matter of law.

(15, 16) (16) In their Answer defendants asserted affirmatively the defense that the contract was contrary to public policy. On the undisputed facts, that defense is as a matter of law insufficient. A contract is not void as against public policy unless it is injurious to the interests of the public, or contravenes some established interest of society. 7 Florida Jurisprudence, Contracts, § 62. That is, contracts void as contrary to public policy are so because they are either agreements to effect some unlawful or socially repugnant end, or agreements to effect some lawful end by unlawful or socially repugnant means. See, 6A Corbin on Contracts, § 1373, p. 2. This contract fits in neither category. It was entered by defendants as public officials pursuant to legislative authority hereinbefore cited.

(17, 18) (17) Defendants also asserted by way of motion to dismiss the complaint filed along with their Answer to the complaint, that the contract is not sufficiently definite in its terms to be specifically enforced. This contention, the Court concludes, is without merit. The option to purchase granted the plaintiff which became a binding contract of sale and purchase upon plaintiff's exercise of its option, contained all of the essential provisions of a contract for the sale of land, i. e. (1) the property to be conveyed and the interest therein to be conveyed is definitely described; (2) the purchase price is definite and specific; and (3) the time and terms of payment of the purchase price are definite. Edwards v. Rives (1895), 35 Fla. 89, 17 So. 416; Florida Yacht Club v. Renfroe (1914), 67 Fla. 154, 64 So. 742; Dixie Naval Stores Co. v. German-American Lumber Co. (1918), 76 Fla. 339, 79 So. 836. The fact that the contract in question provided alternatively at plaintiff's election, for an all cash payment simultaneously with delivery to plaintiff of a deed or a cash down payment simultaneously with execution of a deed, with the balance of the purchase price to be payable over a definite period of time pursuant to a promissory note given by plaintiff to defendants, does not preclude the contract from being specifically enforced. Taylor v. Mathews (1907), 53 Fla. 776, 44 So. 146. The elements urged by defendants that are not specifically covered in the contract are not essential elements of a contract to purchase. As to these, absolute certainty or definiteness is not required (29A, Fla. Jur., Specific Performane, § 40, pp. 633, 634) and each may be supplied or reduced to certainty by legal rules and presumptions. Daubmyre v. Hunter (1923), 86 Fla. 326, 98 So. 69; Stone v. Austin (2nd DCA 1958), 107 So.2d 232.

(18) The equities herein are with the plaintiff. It would be inequitable to now deny plaintiff the rights accorded it under the parties' contract. Specific performance is an appropriate and necessary remedy. There is no genuine issue as to any material fact and plaintiff is entitled to judgment as a matter of law.

Accordingly, it is

Ordered and adjudged as follows:

(1) Plaintiff's Motion for Summary Judgment be and the same hereby is granted; and final judgment be and the

[66] same hereby is entered in favor of plaintiff and against defendants for the relief sought in the complaint. Defendants are hereby ordered and directed within thirty days from the date of entry of this Order, to execute a contract of purchase covering the lands described in paragraph No. 1 of the Lease-Option in accordance with the terms of paragraph 8(b) thereof unless by agreement all parties extend such thirty days' time limit. Defendants are further hereby ordered and directed to accept payment by plaintiff in any amount equal to or in excess of twenty percent (20%) of the total purchase price simultaneously with execution of said contract to purchase; and to accept a promissory note for an amount equal to the unpaid balance of the purchase price, and to accept payments, including any advance payments, made thereunder in accordance with paragraph 8(b) of the contract; and upon payment by plaintiff of the balance and entirety of the contract purchase price, defendants are further hereby ordered and directed to deliver to plaintiff a fee simple deed to said lands vesting good and merchantable fee simple title to plaintiff, subject to applicable statutory rights and reservations as provided for in paragraph 8(b) of the Lease-Option. Should plaintiff elect at or prior to the time herein prescribed for closing to pay the total amount of the purchase price for said lands, the defendants are ordered and directed to receive from the plaintiff the total amount of purchase price for said lands in cash and to simultaneously therewith execute and deliver to the plaintiff a deed vesting in the plaintiff good and merchantable fee simple title to said lands, subject only to applicable statutory

rights and reservations as provided for in paragraph 8(a) of the Lease-Option. The covenant contained in Paragraph 5 of the Lease-Option remains in full force and effect to the same extent and in the same manner as if the contract had been performed without necessity for Court ordered specific performance.

(2) Defendant's Motion to Dismiss be and the same hereby is denied.

(3) The parties will bear their own costs.

(4) The Court retains jurisdiction of this cause for the purpose of entering such further order or orders as may be necessary and appropriate to enforce the provisions of this judgment.

motion to dismiss

Supreme Court, U. S.
FILED
SEP 24 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

CASE NO. 75-284

METROPOLITAN DADE COUNTY, FLORIDA, et al.,
Appellants,

vs.

AEROJET-GENERAL CORPORATION,
Appellee.

On Appeal from The United States Court of Appeals for the Fifth Circuit, Case No. 74-1192

APPELLEE'S MOTION TO DISMISS OR AFFIRM

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CASE NO. 75-284

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APPELLEE'S MOTION TO DISMISS OR AFFIRM

Comes now Aerojet[1] and respectfully represents to the Court that the judgment below rests upon four sep-

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[1]Aerojet-General Corporation, Appellee below and here was the Plaintiff in the District Court, and will be referred to herein as "Aerojet" or Appellee. All emphasis contained herein is supplied, unless otherwise noted.

arate and independent grounds, all of which would have to be set aside before reversal of the judgment would be proper. Yet, as more fully hereinafter appears, at least two of those grounds—state res judicata and virtual representation—are not before this Court.

Aerojet, pursuant to this Court's Rule 16, moves to dismiss this appeal taken by Dade County[2] under 28 *U.S.C.* §1254(2) for the following reasons:

1. The judgment below construed the subject contract as unaffected by §253.111, *Fla. Stat.* It did not invalidate that statute under the Impairment Clause. It is well settled that a Court of Appeals must have invalidated a state statute on federal grounds before an appeal to this Court based upon 28 *U.S.C.* §1254(2) will lie.

2. Even assuming that the judgment below is appealable, because of the restrictive scope of 28 *U.S.C.* §1254(2), this appeal will not bring up either the federal or state res judicata and virtual representation issues, which are unrelated to any invalidation question attempted to be raised. Since either federal or state res judicata and virtual representation is adequate to support the judgment below, the first issue raised by Dade County is moot. Therefore, a decision by this Court would be advisory.

[2]Appellants here and in the Court of Appeals, and Defendants in the District Court, consist of the individual members of the Board of County Commissioners of Metropolitan Dade County, Florida, the Dade County Attorney, as well as Metropolitan Dade County, Florida. Appellants will be referred to herein as "Dade County", "the County" or Appellants.

3. The cases cited by Dade County to sustain this Court's jurisdiction of an appeal under §1254(2) do not remotely deal with that matter.

4. The judgment below rests upon adequate state grounds in that the prior judgment in the federal specific performance suit between Aerojet and the State Boards has res judicata and virtual representation effect upon Dade County under Florida law. It is immaterial whether state res judicata and virtual representation principles apply, or whether federal principles apply, of which Dade County complains in the abstract without asserting any prejudice to itself. The prior federal judgment binds Dade County under Florida law, and, therefore, the first of the County's two questions is moot.

5. If the appeal is dismissed but the appeal papers are treated as a petition for certiorari, the petition should be denied, since the appeal papers do not seek review of the state res judicata and virtual representation questions, nor could they under the appellate statute; those grounds are adequate to support the judgment below. Thus, appellate review would be advisory.

Alternatively, since the questions upon which the decision of the cause depends are so unsubstantial as not to need further argument, Aerojet moves, pursuant to this Court's Rule 16, to affirm the judgment below for the following reasons:

6. The prior judgment in the federal specific performance suit is res judicata as between Aerojet and Dade County under well-settled principles of Florida law. It also

binds Dade County under established Florida law of virtual representation. Dade County has not challenged these state law grounds on its present appeal and cannot do so under 28 *U.S.C.* §1254(2).

7. The prior judgment in the federal specific performance suit is res judicata as between Aerojet and Dade County and binds the latter pursuant to the doctrine of virtual representation under well-settled principles of federal law.

8. The courts below acted properly when they correctly construed the lease-option contract between Aerojet and the State Boards as referring to §270.11, *Fla. Stat.* (not involved here), which pertains to the reservation of mineral rights; and that the lease-option contract did not incorporate the provisions of §253.111, *Fla. Stat.*, the subject statute of this appeal. The decision below also correctly interpreted §253.111 not to apply to the contract. This construction is clear when §253.111 is read in its entirety. Dade County twice prints only part of that statute in its Jurisdictional Statement, at v, and 4, and twice omits the portions of the statute which both the Court of Appeals and the District Court considered in reaching the conclusion that the statute was inapplicable to the lease-option contract because of the statute's clearly prospective operation.

STATEMENT OF THE CASE

The Statement of the Case contained in Appellants' Jurisdictional Statement, at 5-17 thereof, is reasonably accurate, except as hereinafter noted, but is deficient in its omission of certain material facts which are essential to the proper resolution of Appellants' attempt to invoke this Court's jurisdiction under the provisions of 28 *U.S.C.* §1254(2), or alternatively, to any consideration of the appeal papers as a petition for a writ of certiorari, pursuant to 28 *U.S.C.* §2103.

In the discussion of Aerojet's federal specific performance action against the State Boards,[3] *Aerojet-General Corp. v. Kirk*, 318 F.Supp. 55 (N.D. Fla. 1970), *aff'd sub nom. Aerojet-General Corp. v. Askew*, 453 F.2d 819 (5th Cir. 1971), *cert. denied*, 409 U.S. 892 (1972). Appellants go to lengths to emphasize that the effect or applicability of §253.111, *Fla.Stat.*, was never raised or considered in those proceedings.

Appellants refuse to recognize the undisputed facts that the State Boards knew this statute was available as a possible defense in Aerojet's action, and that, for reasons known only to them, the State Boards chose not to raise the statute in the specific performance action. *Aerojet-General Corp. v. Askew*, 511 F.2d 710, 718 (5th Cir. 1975); 366 F.Supp. 901, 909-10, & n.2 (N.D. Fla. 1973).

[3]The Board of Trustees of the Internal Improvement Trust Fund of Florida, and the State Board of Education of Florida, made up of various state officials, were the sole Defendants in the specific performance action. They were also Defendants in the instant declaratory judgment suit, but took no appeal from the District Court's final judgment. They will be referred to hereinafter as the "Trustees" or the "State Boards."

Both the District Court and the Court of Appeals gave the State Boards every opportunity to defend the specific performance action, and even raised additional defenses which were not pleaded or contained in their briefs. The Court of Appeals even allowed the State Boards to recant various concessions made in the District Court by their predecessors in office. Nevertheless, the District Court granted, and the Court of Appeals affirmed, Aerojet's right to specific performance. This Court denied the State Boards' petition for a writ of certiorari on October 10, 1972, not on October 12, as erroneously stated by Appellants.[4]

Appellants' Jurisdictional Statement also fails to note that the District Court's decree of specific performance retained that Court's jurisdiction "for the purpose of entering such further order or orders as may be necessary and appropriate to enforce the provisions of [the] judgment." 318 F.Supp. 55, 63. Such retained jurisdiction was proper. 28 *U.S.C.* §§2202 and 2283. Moreover, Appellants ignore the fact the District Court, by a further order approving the form of deed, *construed* the contract's clause 8(a) to include as "applicable statutory rights and reservations" those percentages of mineral interests contemplated by §270.11, *Fla.Stat.* That construction comported with the Florida Attorney General's interpretation of the contract language in 1962, 511 F.2d 710, 722-23, as well as with the forms of deed proposed by both the State Boards and Aerojet.

[4]Jurisdictional Statement at 8. It is significant to note that the Florida Supreme Court's opinion in which it issued its peremptory writ of mandamus was handed down on *October 11, 1972*, one day *after* the specific performance litigation was finally terminated by this Court's denial of certiorari. 409 U.S. 892 (1972).

Appellants' discussion of the Florida mandamus proceeding, brought by them against the State Boards as an original action in the Florida Supreme Court, warrants additional comment. Their characterization of the arguments contained in Aerojet's *Amicus* Memorandum of Law falsely implies that Aerojet participated in arguing the merits of that action. The *Amicus* Memorandum was filed only to assert the total lack of statutory or other authority for each of the two unorthodox procedures by which Dade County and the State Boards attempted to involve Aerojet as a party in that proceeding. The memorandum also presented to the Court the obvious facts demonstrating that the mandamus relief sought by Dade County could not be obtained from the State Boards, since their interests in the land had already been conveyed by Commissioner's Deed pursuant to the federal courts' specific performance judgments and mandate. By granting Dade County's requested relief, the Florida court ordered the impossible: the Trustees were to offer *Aerojet's land* to the County.

It is clear that the Florida court never considered these facts and disregarded the fact that Aerojet, although a party to the contract which that court sought to interpret, was not a party to that mandamus proceeding,[5] and that no judgment or mandate entered by it could ever be binding upon Aerojet as an *Amicus*. The peremptory writ of mandamus was the product of an admittedly friendly lawsuit, wherein the two parties acted in concert to achieve the result which totally ignored and disregarded the fed-

[5]By an order entered the same day as its mandamus opinion, the Supreme Court of Florida determined that Aerojet was not a proper party to that proceeding. It granted Aerojet's Motion to Dismiss or Quash the State Boards' "Third-Party Complaint" and refused to allow Dade County's amendment or extension of the Alternative Writ to include Aerojet as a respondent.

eral court proceedings that had been finally concluded by this Court's denial of certiorari *before* the Florida Supreme Court ever mentioned the 1965 statute, or the 1961 contract.

In the text of their argument, Appellants seek to challenge the District Court and Court of Appeals characterization of the mandamus proceedings as a non-adversary or friendly lawsuit by attacking the evidentiary basis upon which the courts' determinations rested. The reference in the Court of Appeals opinion to the admissions by the Deputy Attorney General of Florida at the Summary Judgment hearing cites only a portion of the evidence contained in the voluminous record before the Court of Appeals. That record is replete with similar statements as well as with other evidence of concerted actions taken by the State Boards and the County to obtain their desired result from the Florida court.[6] Dade County has not challenged (nor can it now challenge in this direct appeal) the factual bases in the record on appeal for the findings of the lower courts.

Appellants' discussion of the other aspects of the holdings and opinions of both courts below are likewise unavailing to their position here. The opinions clearly demonstrate that the Court of Appeals sustained each holding of the District Court, contrary to the Appellants' assertion that "the Court of Appeals *departed* from the reasoning of the District Court in several *significant* re-

[6] *E.g.*, the State Board's filing of a waiver of notice of hearing and consent to the issuance of an alternative writ of mandamus the same day that Dade County filed its petition therefor; their filing of a return to the alternative writ admitting all of Dade County's contentions as to the application of §253.111.

spects," Jurisdictional Statement of Appellants at 16. The Fifth Circuit only disagreed with the District Court's application of *state* res judicata and virtual representation principles to determine the binding effect of the specific performance judgment upon Dade County, but found the federal principles to be identical.

The first two "departures" are that the Court of Appeals chose to apply the *federal* law of res judicata and the doctrine of virtual representation, rather than *state* law, as applied by the District Court. This is a distinction without significance, since, as discussed *infra* at 25-28, both federal and state law on these matters is identical. Dade County nowhere argues how choosing one body of law will in any way give them a basis for reversing the judgment appealed from under the provisions of 28 *U.S.C.* §1254(2). The Court of Appeals, in affirming the District Court judgment, recognized there would be no difference in the result herein by the application of federal rather than state law of res judicata and virtual representation, noting no need to remand. 511 F.2d 710, 719 n.10.

The next alleged "departure" by the Court of Appeals is the conclusion that the mandamus opinion was not entitled to consideration by the federal courts because it resulted from non-adversary proceedings before the Florida court. This conclusion in no way departs from the judgment of the District Court that the mandamus opinion was not authoritative Florida law, "implicitly or otherwise." 366 F.Supp. 901, 908.

Finally, Dade County points to the Court of Appeals' belief that the correctness of its statutory and contractual

interpretations which made §253.111, *Fla. Stat.*, inapplicable to the Aerojet contract was reinforced by its *certainty* that if applied as the County contended, the statute would violate the Impairment Clause. The District Court expressly held that the application of the statute to the Aerojet contract, as Dade County argued, would *not* be a "legitimate impairment" of Aerojet's lease-option contract, under the Contract Clause. 366 F.Supp. 901, 906-08.

In addition to the foregoing inaccuracies and omissions in the Statement of the Case, the County has also failed to include anywhere in its Jurisdictional Statement, either the entire statute upon which its appeal herein is sought to be based, *i.e.*, 28 *U.S.C.* §1254(2), nor the entire text of the state statute allegedly invalidated by the Court of Appeals judgment. The text of 28 *U.S.C.* §1254(2) is cited herein at 18, *infra*. The state statute claimed to be invalidated, §253.111, *Fla. Stat.*, is set forth at 12, *infra*.

The Appellants have continually relied upon the prohibitory language of the first portion of the introductory paragraph of the state statute, but have consistently omitted from their Jurisdictional Statement, as well as from every pleading and brief filed by them in the lower courts, the express terms and conditions found in paragraphs (1) through (7) of §253.111. Those paragraphs make the 1965 legislative proscription operative only under limited and carefully prescribed conditions, none of which, had they been complied with, could have given rise to a retroactive application of the statute.

ARGUMENT

I.

THIS APPEAL IS IMPROVIDENTLY TAKEN UNDER 28 *U.S.C.* §1254(2), AND SHOULD BE DISMISSED.

A. The Judgment Below Construed The Subject Contract As Unaffected By §253.111, *Fla. Stat.* It Did Not Invalidate That Statute Under The Impairment Clause. It Is Well Settled That A Court Of Appeals Must Have Invalidated A State Statute On Federal Grounds Before An Appeal Based Upon 28 *U.S.C.* §1254(2) Will Lie.

The State Boards entered into a lease-option contract with Aerojet on December 21, 1961. Aerojet had the right to exercise the option to purchase during the ten-year leasehold period. This contract further provided that any deed received by Aerojet was to be subject to applicable statutory rights and reservations in effect on the date of conveyance, by which reservation the State Boards were to receive certain percentages of mineral interests located in or on said lands, pursuant to §270.11, *Fla. Stat.*

Section 253.111, *Fla.Stat.*, was enacted in 1965. The operative portions read (the matter in italics is *twice* omitted by Dade County in its Jurisdictional Statement, at v, and 4):

> "253.111 Notice to Board of county commissioners before sale.—The board of trustees of the

internal improvement trust fund of the state shall not sell or convey any land to which they hold title unless and until they shall afford an opportunity to the county in which such land is situated to receive such land for public purposes *on the following terms and conditions:*

(1) If an application is filed with the board requesting that they sell certain land to which they hold title and the board shall decide to sell such land or if the board shall, without such application, decide to sell such land the board shall, before consideration of any private offers, notify the board of county commissioners of the county in which such land is situated that such land is available to such county. Such notification shall be given by registered mail, return receipt requested.

(2) The board of county commissioners of the county in which such land is situated shall, within ninety days after receipt of such notification from the board, determine by resolution whether or not it proposes to devote such land to public parks, public beaches, public fishing piers, public boat ramps, public dockage facilities or other public outdoor recreational purposes, hereinafter referred to generally as public outdoor recreational purposes."[7]

[7]The concluding paragraphs of this statute are as follows:

"(3) If the board of county commissioners shall determine that it proposes to devote such land in perpetuity to public outdoor recreational purposes it shall adopt a resolution specifying such determination and setting forth:

(a) The specific public outdoor recreational purpose or purposes to which it proposes to devote such land;

(b) A tentative plan of development for such land;

(c) A tentative time schedule of development, which tentative time schedule shall set a date of commencement of development not later than two years after the date of such resolution and a date of conclusion of development not later than four years after the date of such resolution.

A certified copy of such resolution shall be furnished to the board within such ninety day period by registered mail, return receipt requested.

(4) If the board of county commissioners determines that it does not propose to devote such land to public outdoor recreational purposes it shall notify the board of such determination by sending, immediately after adoption, a certified copy of the resolution so specifying to the board by registered mail, return receipt requested. If the board of county commissioners shall fail to act as provided in subsection (3) within the ninety day period, such failure shall constitute a determination that it does not propose to devote such land to public recreational purposes.

(5) If the board receives within the ninety day period the certified copy of the resolution provided in subsection (3), the board shall forthwith convey to the county such land upon such terms and conditions and at such price as the board shall determine (but in no case at a price higher than such property would be disposed of under any other provision of this chapter), but subject to a reverter to the board if such land shall not be devoted to the public outdoor recreational purpose or purposes specified in such resolution in substantial accordance with the plan of development and the time schedule for development set forth in such resolution, and shall not be devoted in perpetuity to some public purpose.

(Footnote Continued on Next Page)

The construction of the contract, and in particular, whether it was subject to §253.111 presented questions for independent resolution by the federal courts below since they were faced with an Impairment Clause challenge to the statute, were it deemed to apply to the contract. *Atlantic Coast Line R. Co. v. Phillips*, 332 U.S. 168 (1947); *Irving Trust Co. v. Day*, 314 U.S. 556 (1942); *Higginbotham v. City of Baton Rouge*, 306 U.S. 535 (1939); *Coombes v. Getz*, 285 U.S. 434 (1932); *Larson v. South*

Dakota, 278 U.S. 429 (1929); *Appleby v. City of New York*, 271 U.S. 364 (1926). The Court of Appeals, affirming the District Court's judgment, held that the contract was not subject to §253.111, as the statute was intended to operate prospectively. Further, to have construed the contract as subject to §253.111 would have been "absurd" and "unreasonable", as it would have meant that Aerojet had given valuable consideration for an option to purchase which could be nullified at will by the state legislature. Accordingly, the Fifth Circuit did not reach the question

(Footnote Continued from Previous Page)

(6) (a) If the board of county commissioners shall determine that it does not propose to devote the land to public outdoor recreational purposes the board may dispose of the property as otherwise provided in this chapter.

(b) It shall not be a violation of the reverter clause of any deed from the board to a county under this section if the county shall in fact use the property for a public outdoor recreational purpose other than that specified in the resolution provided in subsection (3) or not in substantial accordance with the plan of development and time schedule set forth in such resolution if the board shall by appropriate resolution approve such change or such failure to act in substantial accordance with the plan of development or time schedule.

(c) Nothing in this section shall restrict any right otherwise granted to the board by this chapter to convey land to which they hold title to the state or any department, office, authority, board, bureau, commission, institution, court, tribunal, agency or other instrumentality of or under the state. The word land as used in this act means all lands vested in the board of trustees of the internal improvement trust fund.

(7) If any riparian owner shall exist with respect to any land to be sold by the board, such riparian owner shall have a right to secure such land, which right shall be prior in interest to the right in the county created by this section, provided that such riparian owner shall be required to pay for such land upon such prices, terms and conditions as determined by the trustees. Such riparian owner may waive this prior right in which case this section shall apply."

whether §253.111 was invalid under the Impairment Clause. 511 F.2d 710, 723. Dade County concedes as much in its Jurisdictional Statement.[8]

The effect of the judgment below does not visit statewide or any other kind of doom upon §253.111, which might warrant an appeal. All it does is decide a particular contract matter not likely to recur. This matter cannot be brought within this Court's obligatory jurisdiction, for as this Court recently observed:

> "Jurisdictional statutes are to be construed with precision and with fidelity to the terms by which Congress has expressed its wishes, . . . and we are particularly prone to accord strict construction of statutes authorizing appeals to this Court."[9]

It is well settled by previous decisions of this Court that a Court of Appeals must have expressly invalidated a state statute on federal grounds before an appeal to this Court under §1254(2) will lie. *Public Serv. Comm'n v. Batesville Tel. Co.*, 284 U.S. 6 (1931); *Bradford Elec. Light Co. v. Clapper*, 284 U.S. 221 (1931).

[8]Dade County states: "The Court of Appeals' belief in the correctness of its interpretation of §253.111, Florida Statutes, was reinforced by its certainty that, *if* the statute were construed as Dade County contended, and as the Florida Supreme Court had agreed was the correct construction, it would violate the Impairment of Contract Clause of the United States Constitution. 511 F.2d at 723." Appellants' Jurisdictional Statement at 16-17.

[9]*Palmore v. United States*, 411 U.S. 389, 396 (1973), (citations omitted). Professor Kurland has noted: "Moreover, everybody seems agreed that the Court's compulsory jurisdiction should be elminated and that all cases should come by way of petition for certiorari." Kurland, *Jurisdiction Of The United States Supreme Court: Time For A Change?*, 59 CORNELL L. REV. 616, 624 (1974) (footnote omitted). *See also* FEDERAL JUDICIAL CENTER, STUDY GROUP ON THE CASE LOAD OF THE SUPREME COURT, REPORT 9 at 25 (1972).

In *Batesville*, a case analogous here, this Court dismissed an appeal founded upon the predecessor of §1254 (2).[10] Batesville sought to enjoin an order of a state commission upon the grounds that the order exceeded the commission's authority and was violative of the Due Process and Equal Protection Clauses of the United States Constitution. Because the commission lacked authority to make the order under state law, the Seventh Circuit reversed the District Court, and ordered the issuance of the injunction.

This Court dismissed the commission's appeal because the Court of Appeals had not invalidated the state statute on federal grounds, but had interpreted the applicable state law in a manner which prohibited the commission's action. In describing the scope of appeals permitted under the predecessor of §1254(2), this Court stated:

> "The plain intent of this statute is to limit appeals to this Court from a Circuit Court of Appeals to cases where its decision is against the validity of a statute of a State upon the ground of its being repugnant to the Constitution, treaties, or laws of the United States. In other cases, review by this Court, if it be had, must be pursuant to a writ of certiorari duly applied for and granted.
>
> As in this case the Circuit Court of Appeals did not decide against the validity of the order of the Public Service Commission upon the asserted federal grounds, but dealt with its validity solely under the state law, the appeal must be dismissed." 284 U.S. at 6-7.

[10]The statutory predecessor of 28 *U.S.C.* §1254(2) is §240(b) of the Act of February 13, 1925, formerly 28 *U.S.C.* §347 (1940 ed.).

In the present action, the Fifth Circuit did not invalidate §253.111 upon either the Contract Clause ground, or under state law. Instead, it found §253.111 inapplicable to the subject contract.

In *Bradford*, the First Circuit decided that the Vermont Workmen's Compensation Law precluding negligence actions, was inapplicable to bar a suit arising out of a New Hampshire accident brought in that state against a Vermont corporation. The corporation appealed to this Court under the predecessor of §1254(2), contending that the Court of Appeals had invalidated the Vermont law. This Court dismissed the appeal, stating, "[a]s the decision of the Circuit Court of Appeals was not against the validity of the statute of Vermont, the appeal to this Court must be dismissed for the want of jurisdiction." 284 U.S. at 222-23 (citations omitted).

The present action is substantially similar to *Bradford*. By the judgment appealed from, the Fifth Circuit *did not invalidate* §253.111, *Fla. Stat.*, but found it inapplicable to the subject contract, in much the same way that the First Circuit in *Bradford did not invalidate* the Vermont law, but found it inapplicable to the New Hampshire action.

The present appeal does not have the requisite characteristics of a §1254(2) appeal. The Court of Appeals invalidated no state statute.

B. Assuming That The Judgment Below Is Appealable, The Appeal Will Not Bring Up Either The Federal Or State Res Judicata And Virtual Representation Issues, Which Are Unrelated To Any Invalidation Issue Attempted To Be Raised. Since Either Federal Or State Res Judicata And Virtual Representation Is Adequate To Support The Judgment Below, The First Issue Raised By Dade County Is Moot. A Decision By This Court Would Be Advisory.

Appellants ask this Court to review the propriety of the Fifth Circuit's holding that the res judicata effect of a prior federal judgment as well as the application of the doctrine of virtual representation are matters of federal, not state, law. These issues are not reviewable under §1254(2).

The question of reviewability is related to the policy of restricting obligatory appeals. Section 1254(2) states *in its entirety* (the italicized clauses being omitted from the County's Jurisdictional Statement):

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, *but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented.*"

We have found no authority that squarely decides whether §1254(2)'s "Federal questions presented" limitation includes all federal questions that may be in the case or only those federal questions pertaining to the invalidation of the state statute. Chief Justice Taft opted for a narrow interpretation of §1254's predecessor consistent with the history of that section. He wrote:

> "The chief agency employed in the new Act to accomplish its purpose is the enlargement of the classes of cases which must stand the preliminary test of an application for writ of certiorari . . . i.e. by transferring more cases from the obligatory to the discretionary jurisdiction than as provided in the Act of 1891 and its amendments.
>
> . . . .
>
> The only exception to this general rule is in a narrow class of cases in which the validity of a state statute is questioned as violating the Constitution or a treaty or statute of the United States, and the decision of the lower court is against its validity. In such a case, a writ of error or appeal from the intermediate appellate court lies to the Supreme Court, but the consideration of the reviewing court in such review is limited to *the Federal question.* Should the defeated party desire to have the whole case examined on its merits, he can only secure this by abandoning his right to an appeal or writ of error and by invoking the discretion of the Supreme Court by applying for a writ of certiorari."[11]

[11]Taft, *The Jurisdiction of the Supreme Court Under the Act of February 13, 1925*, 35 YALE L.J. 1, 2-5 (1925).

Even if "Federal questions presented" could include all federal issues in the case, Dade County must fail in achieving review by this Court under §1254(2). It is well established that §1254(2) does not embrace review of state law questions:[12]

> "Where it appears that the Court of Appeals decision rests not only upon a holding that the state statute is invalid but also upon a wholly independent ground which is not subject to review by means of appeal [e.g., state law] . . ., the appeal would be subject to dismissal."[13]

Assuming, as the County argues, the propriety of the Fifth Circuit's application of federal principles of res judicata and virtual representation is reviewable under §1254(2), such issues are moot. This Court would be rendering an advisory opinion herein, since the federal and Florida law on res judicata and virtual representation are the same. 511 F.2d 710, 719 n. 10. Dade County has made no contention, nor could any be validly made, that a different result would obtain if state, rather than federal res judicata and virtual representation principles be applied.

C. The Cases Cited By Dade County To Sustain This Court's Jurisdiction Of An Appeal Under §1254(2) Do Not Remotely Deal With That Matter.

Appellants have taken a mysterious path in their selection of cases in support of this Court's jurisdiction,

[12] *See* C. WRIGHT, FEDERAL COURTS §106 (2d ed. 1970); R. ROBERTSON & F. KIRKHAM, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES §124 (2d ed. R. Wolfson & P. Kurland 1951).

[13] R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE §2.6 (4th ed. 1969).

for none of the three deals even remotely with that matter. The first, *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) did not even discuss jurisdiction in general much less the discrete subject of appellate jurisdiction under 28 *U.S.C.* §1254(2).

No less peculiar is Appellant's reliance upon *Atlantic Coast Line R. Co. v. Phillips*, 332 U.S. 168 (1947), which was an appeal from a state court. Thus, the case can have no relevance to the question of the propriety of the present appeal from a federal Court of Appeals.

Equally inapposite is the third case on which Appellants rely, *Lehman Brothers v. Schein*, 416 U.S. 386 (1974). As this Court heard *Lehman* on petitions for certiorari, it has no relevance to the present §1254(2) appeal.

In sum, of the three cases on which Appellants seek to sustain jurisdiction in the present action, none involved a §1254(2) appeal, and none even remotely discussed such appeals. The three cases cited by Appellants provide no support for a §1254(2) appeal.

D. The Judgment Below Rests Upon Adequate State Grounds That Require Dismissal Of Appellants' Appeal.

The res judicata and virtual representation questions are also unreviewable as moot. In presenting the federal res judicata question for appeal under §1254(2), assuming that the question is reviewable, Dade County makes no attempt to show that the resolution of its case is affected by the application of federal rather than state

res judicata principles. Indeed, the federal and state principles of res judicata and virtual representation applicable in this case are the same. The District Court relied upon Florida res judicata and virtual representation principles in rendering judgment for Aerojet. 366 F.Supp. 901, 908-911. In affirming, the Court of Appeals relied upon federal principles, but recognized that the state res judicata and virtual representation principles were the same. It stated:

> "Except for the decision of the Florida Supreme Court in the mandamus suit brought by Dade County against the Trustees, the Florida law of res judicata on the scope of the cause of action and the doctrine of virtual representation is the same as the federal law [citations omitted]." 511 F.2d 710, 719 n. 10.

Nor does the Florida Supreme Court mandamus judgment alter the identity of res judicata and virtual representation principles under federal and state law. At no point in its mandamus opinion did the Florida Supreme Court explicitly or otherwise discuss the res judicata effect of, or the application of the doctrine of virtual representation to, the prior federal judgment.[14] Furthermore, even had such issues been raised and the court had ruled upon them, such a ruling would not be binding upon Aerojet, which was not a party to the Florida suit, nor in privity with any party thereto nor virtually represented by any party. To hold otherwise would deny Aerojet due process of law. *Hansberry v. Lee*, 411 U.S. 32 (1940).

[14]In Florida, res judicata is a matter of defense that must be specifically pleaded by a party. Rule 1.110(d), Fla. R. Civ. P.; Taylor v. Taylor, 130 So.2d 115 (Fla. App. 3d Dist. 1961).

Consequently, the res judicata question posed by Appellants is moot. Because federal and Florida law of res judicata and virtual representation are identical, it is immaterial which principles are applied. Under either body of law, the prior judgment in favor of Aerojet in the federal specific performance suit between Aerojet and the State Boards binds Dade County.

E. If The Appeal Is Dismissed But The Appeal Papers Are Treated As A Petition For Certiorari, The Petition Should Be Denied, Since The Appeal Papers Do Not Seek Review Of The State Res Judicata Or Virtual Representation Questions; Those Grounds Are Adequate To Support The Judgment Below, And Review Would Be Only Advisory.

Dade County is restricted by the terms of §1254(2) to raising the "Federal questions presented." If the appeal is dismissed as improper, this Court is required to treat the appeal papers as a petition for certiorari. 28 *U.S.C.* §2103. A petition raising the issues presented by the County's appeal papers should, however, be denied. *Supreme Court Rule* 19(b). As shown above, the state res judicata and virtual representation questions are not presented for review nor could they be on this appeal. Those grounds are adequate and independent grounds which support the judgment below. This Court would be asked for an advisory opinion.

II.

SHOULD THE APPEAL BE SUSTAINED, AEROJET MOVES TO AFFIRM THE JUDGMENT BELOW ON THE GROUND THAT THE QUESTIONS PRESENTED ARE UNSUBSTANTIAL AND NEED NO FURTHER ARGUMENT.

This Court should not review the Fifth Circuit's judgment on Dade County's appeal taken pursuant to 28 *U.S.C.* §1254(2). Nevertheless, if this Court grants appellate review, it should *affirm* the judgment below pursuant to *Supreme Court Rule* 16(1)(c) and (d). No unsettled or substantial federal questions are presented by the case at bar. The courts below correctly interpreted the subject contract and state statute. Further argument of these issues is unnecessary.

Aerojet appears before this Court for the second time to protect its title to its land. The present litigation represents the latest effort by Dade County to deprive Aerojet of property to which Aerojet has had both an adjudicated right to title since the District Court's decree of September 21, 1970, and a mandated right to title since March 8, 1972, the date of the Fifth Circuit's mandate.

Dade County and its allies, the State Boards, have subjected Aerojet to an arduous path of litigation beset with procedural machinations. Each time the case has been before the federal courts, Aerojet has consistently and rightfully prevailed. This litigation should be ended. The Court's already overburdened appellate docket should not be utilized to allow Dade County to frustrate and postpone

Aerojet's right to enjoyment of its property. The case at bar warrants summary affirmance pursuant to this Court's Rule 16. In this way, the interests of justice will best be served.

F. The Prior Judgment In The Federal Specific Performance Suit Is Res Judicata As Between Aerojet And Dade County And Binds The Latter Under The Doctrine Of Virtual Representation Under Well-Settled Principles Of Florida Law.

G. The Prior Judgment In The Federal Specific Performance Suit Is Res Judicata As Between Aerojet And Dade County And Binds The Latter Under The Doctrine Of Virtual Representation Under Well-Settled Principles Of Federal Law.

Appellants urge that the res judicata effect of the federal specific performance decree should be governed by the res judicata principles of Florida law, as the District Court held. 366 F.Supp. 901, 908. The Court of Appeals in affirming the result, nevertheless held that a federal court should act pursuant to federal standards to determine the scope and binding effect of its own prior judgments, even when rendered in a diversity case. 511 F.2d 710, 715. But whether federal or Florida res judicata principles govern, the result in this case is the same. Federal and Florida tests for that doctrine's application are identical.

Dade County advances this moot issue in a feeble attempt to obfuscate elementary principles of res judicata. Clearly, res judicata warrants summary affirmance by this Court.

The specific performance decree, affirmed by the Fifth Circuit in 1971 with certiorari denied by this Court the following year, is res judicata as to the State Boards. The County has so conceded. 511 F.2d 710, 719. The County has also admitted that there is no question as to the identity of the causes of action presented by the specific performance suit and action below. Indeed, as the District Court noted:

> "The parties in the matter before this Court seemingly concede that *res judicata* would be applicable but for the question of the identity of the parties." 366 F.Supp. 901, 909 (emphasis by the Court).

Well-established principles of *both* Florida and federal res judicata law, discussed and followed by both courts below recognize that persons who are not parties to an action may nonetheless be bound by a judgment if they are in privity with a party litigant. Dade County, which supports its claim to the subject land by a wild deed from the Trustees issued *after* Aerojet had recorded the District Court Commissioner's Deed issued pursuant to the decree of specific performance, is bound by basic principles of privity of estate to the terms of the specific performance decree:

> ". . . Thus, for instance, if B [Dade County] acquires property from A [Trustees] after commencement of suit between A [Trustees] and X [Aerojet] involving A's title to the property, *a judgment adverse to A [Trustees] in that suit also binds B [Dade County], although B [Dade County] was not himself a party to that suit.*" J. MOORE, FEDERAL PRACTICE ¶0.411 (2d ed. 1965).

Moreover, if as the County claims, its rights to Aerojet's land spring directly from the legislative enactment (§253.111), the plain language of the statute demonstrates that the County's right to title, if any, is derived from that of their statutory grantors, the State Boards. The County cannot escape the fact that its claimed right to the subject land is derived wholly through the Trustees, and that the County is the Trustees' statutory privy.

Dade County is also bound by the specific performance decree against the State Boards under the doctrine of virtual representation. That doctrine prescribes that a non-litigant is bound by a judgment if one of the parties to the suit is so closely aligned with his interests as to be his virtual representative. The decisions below recognized that both federal and Florida courts have uniformly acknowledged this rule. 511 F.2d 710, 719; 366 F.Supp. 901, 910. The District Court found:

> "[i]t is clear that the Trustees, as they are charged to do, were contemplating and acting on behalf of the people of the State of Florida in the first proceeding before this Court. The third defense offered by the Trustees in their answer to the complaint recited the fact of this representation. Dade County . . . can only purport to be representing the same interest, i.e., of people in Florida living in Dade County . . ." 366 F.Supp. 901, 910.

Likewise, the Court of Appeals held:

> "Clearly the state boards preferred to transfer the land to the County rather than to Aerojet. Their submissive role in the Florida state court mandamus proceeding amply demonstrates that preference . . .
>
> "The question whether a party's interests in a case are virtually representative of the interests of a nonparty is one of fact for the trial court . . . We find no reason to overturn the District Court's determination . . ." 511 F.2d 710, 719-720.

Thus, the prior judgment in the federal specific performance suit is binding upon Dade County under well-established principles of both *federal* and *Florida* law. This litigation should have ended long ago. Summary affirmance by this Court is therefore appropriate. To do otherwise would be to sanction Dade County's misuse of the judicial system to deprive Aerojet of its prior adjudicated rights.

H. The Courts Below Acted Properly When They Correctly Construed The Lease-Option Contract Between Aerojet And The State Boards As Referring To §270.11, *Fla.Stat.*, Pertaining To Preservation Of Mineral Rights, And As Not Incorporating The Provisions Of §253.111, *Fla. Stat.*

On December 21, 1961, Aerojet and the State Boards entered into a ten-year lease of 25,313 acres of land in Dade County, which lease further granted Aerojet an option to purchase the land. Paragraph 8(a) of this lease-

option contract deals with Aerojet's option to purchase the disputed land in this manner:

> "Upon the election of Lessee [Aerojet] the total amount of the purchase price to be determined, as aforesaid, shall be paid to Lessor simultaneously with delivery to Lessee of a deed to said lands vesting good and merchantable fee simple title thereto in Lessee subject to applicable statutory rights and reservations in effect on date of conveyance." 511 F.2d 710, 722; 366 F.Supp. 901, 903.

Appellants argue that this clause empowered the State of Florida to unilaterally redraft the subject contract by any subsequent legislation. More specifically, Appellants contend that Paragraph 8(a) of the subject contract contemplated a later modification in the form of §253.111, *Fla. Stat.*, passed in 1965, which gave Dade County an alleged right of first refusal of Aerojet's land. Such a construction would so strain the contractual language that both courts below rejected it as absurd and irrational.

Both the Court of Appeals and the District Court interpreted Paragraph 8(a) as referring to §270.11, *Fla. Stat.*, a statute in effect at the time of the execution of the lease-option. Section 270.11 provides for the reservation in the Trustees and Board of certain percentage interests in specified minerals, etc. which are contained in lands which are sold by the State Boards.[15]

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[15]Section 270.11, *Fla. Stat.*, is set forth in its entirety in the Court of Appeals opinion. 511 F.2d 710, 722 n.14.

This construction rested on a solid foundation. First, to decide that Paragraph 8(a) contemplated the enactment of §253.111, *Fla.Stat.*, or any similar provision must presume that the parties contemplated the passage of a statute which would defeat their engagements, and that Aerojet gave valuable consideration for an option to purchase that the state legislature could nullify at will. To make either of these presumptions is to interpret the subject contract in an unreasonable and irrational manner, inconsistent with both Florida and common law principles of contract. *Florida Power Corp. v. City of Tallahassee*, 154 Fla. 638, 18 So.2d 671 (1944); *Motor Vehicle Casualty Co. v. Atlantic National Ins. Co.*, 374 F.2d 601 (5th Cir. 1957).

Second, when in January, 1962, Aerojet requested an interpretation of Paragraph 8(a) from the Attorney General of Florida, he replied: "The statutory rights and reservations referred to in the subject portion of this lease and option to purchase are those contemplated in Section 270.11, *Florida Statutes.*" 511 F.2d 710, 723.

Third, as noted by the Court of Appeals, when read in its entirety, §253.111, *Fla.Stat.*, passed in 1965, clearly demonstrates it was a *prospective* measure, and therefore, not one intended to have an impact on the 1961 contract. This conclusion is supported by the future tense of subsection (1) of the statute, the portion which Appellants have conveniently omitted from their Jurisdictional Statement.

Finally, as both lower courts agreed, had §253.111, *Fla.Stat.*, been deemed applicable to all pre-1965 agreements, it would have violated the Impairment of the Obligation of Contracts Clause of the United States Constitution.

After thoughtful analysis and precise construction, the lower courts concluded that the subject contract did not contemplate the incorporation of §253.111. Both courts determined that the Florida Legislature had acted prospectively in passing that statute in 1965, making it inapplicable to the subject contract executed in 1961. The lower courts were eminently correct.

Appellants have continued to assert the illogical retroactive application of §253.111 in an effort to inject new life into a case that should have ended when this Court denied certiorari in 1972. 409 U.S. 892. Appellants have forced Aerojet to follow a path of litigation and re-litigation in order to re-confirm Aerojet's established property rights. It is manifest, analyzing the questions presented by Appellants and in considering the well-reasoned judgments of the courts below, that the questions upon which the decision of this cause depends are so unsubstantial as not to need further argument. Accordingly, this Court should end this already-prolonged journey by summary affirmance.

CONCLUSION

Pursuant to this Court's Rule 16, and based upon the reasons and authorities set forth herein, Aerojet's Motion to Dismiss should be granted and Dade County's Appeal should be dismissed and certiorari denied; alternatively, the judgment appealed from should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned, a member of the Bar of this Court, hereby certifies, pursuant to Rule 33(1), that true and correct copies of the foregoing Motion To Dismiss or Affirm, filed on behalf of Appellee, Aerojet-General Corporation, were served by mail this 23rd day of September, 1975, upon the following: Stuart Simon, Esq., Dade County Attorney, 1626 Dade County Courthouse, Miami, Florida 33130; Alan T. Dimond, Esq., Greenberg, Traurig, Hoffman, Lipoff & Quentel, P.A., 1401 Brickell Avenue, Miami, Florida 33131 and Lawrence R. Metsch, Esq., Shutts & Bowen, Tenth Floor, First National Bank Building, Miami, Florida 33131.

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